Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1312

ARTHUR KRAUSE, Administrator of the Estate of Allison Krause, et al.,
Petitioners,

vs.

JAMES RHODES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1318

ARTHUR KRAUSE, Administrator of the Estate of Allison Krause, *et al.*,

Petitioners,

vs.

JAMES RHODES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States Sixth Circuit Court of Appeals is officially reported in 471 F.2d 430 (1972). It is also included in the Appendix of the Petition For Writ Of Certiorari in the case of Sarah Scheuer v. James Rhodes, et al., United States Supreme Court Case No. 72-914, at pp. la through 69a therein. Portions of that opinion cited in this brief will be referenced accordingly to the aforementioned Scheuer Appendix. The decision of the United States Sixth Circuit Court of Appeals was

rendered in Krause v. Rhodes, et al, and Miller v. Rhodes, et al. (Nos. 71-1622 and 71-1623, 6th Cir.), and were consolidated along with the Scheuer case into one opinion by the United States District Court and by the United States Sixth Circuit Court of Appeals. The Memorandum and Order of the United States District Court is unreported; it is included in the Appendix of the Petition For Writ Of Certiorari in this case at pp. 34-36.

It should be noted that for purposes of this review on the merits, this case, Supreme Court Case No. 72-1318 (Krause and Miller), has been separated from the Scheuer case, Supreme Court Case No. 72-914, and will be treated as a separate appeal.

JURISDICTION

The judgment of the United States Sixth Circuit Court of Appeals was entered on November 17, 1972. On January 3, 1973, the Petition for Rehearing requested by petitioners Krause and Miller, which was timely filed, was denied by the United States Sixth Circuit Court of Appeals. (The order denying the Petition for Rehearing is reprinted in the Appendix of the Petition For Certiorari in this case at p. 32). The Petition for Writ of Certiorari was filed within the ninety (90) days after that date. Certiorari was granted by this Court in this case on June 25, 1973. The jurisdiction of the United States Supreme Court is invoked under Title 28, United States Code, §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

1. **United States Constitution, Amendment XI:**

"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State. . ."

2. **Section One of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. §1983:**

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." [Note: This section will hereinafter be referred to as "The Civil Rights Act"]

3. **Jurisdiction in the United States District Court was premised upon 28 U.S.C. §1343(3) and (4),** which provide:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

4. **Ohio Revised Code §5923.37** (officially set forth in Baldwin's Ohio Revised Code Annotated, Vol. 7 at p. 21) reads as follows:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

5. **United States Constitution, Amendment XIV:**

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . ."

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

6. **Title 28, U.S.C. §1332:**

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to rceover less than the sum or value of $10,000.00, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. . ."

7. **Federal Rules of Civil Procedure, Rule 12(e):**

"*Motion For More Definite Statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just."

8. **Ohio Revised Code** §5923.21 (officially set forth in Baldwin's Ohio Revised Code Annotated, Vol. 6 at p. 50), reads as follows:

"The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia."

9. **Ohio Revised Code §5923.22** (officially set forth in Balwin's Ohio Revised Code Annotated, Vol. 6 at p. 50), reads as follows:

"When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities. No officer or enlisted man in the organized militia shall refuse to appear at the time and place designated when lawfully directly to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case."

10. **United States Constitution, Article I, Section 6:**

"The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

11. **United States Constitution, Amendment I:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

QUESTIONS PRESENTED

1. On a defendant's motion to dismiss a complaint based solely upon the sufficiency of the allegations of that complaint, may a trial or appellate court assume as true factual matters which are contrary to the allegations of that complaint?

2. Does the Eleventh Amendment bar a damage action brought against the Governor of Ohio, and against generals and officers of the Ohio National Guard in their individual capacities while acting under color of state law for the intentional deprivation of constitutional rights under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983, which neither names the state of Ohio as a party defendant, nor seeks to recover any damages payable through the treasury of the state of Ohio or through any public funds?

3. Does any doctrine of executive immunity bar a damage action against the Governor of Ohio and against generals and officers of the Ohio National Guard acting in their individual capacities, individually and in conspiracy, under color of state law for the intentional deprivation of constitutional rights under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983?

4. Where citizens of Pennsylvania and New York bring damage actions in federal court against the Governor of Ohio and against generals and officers of the Ohio National Guard, these defendants all being citizens of Ohio, for committing individually and in conspiracy the wanton killing of innocent students on a college campus, and where an Ohio statute (Ohio Revised Code §5923.37) specifically provides for liability under such circumstances, does a federal court have jurisdiction based upon the diversity of citizenship of the parties?

5. Is the United States a necessary party in a damage action brought against the Governor of Ohio and against generals and officers of the Ohio National Guard in their individual capacities alleging that these defendants, acting individually and in conspiracy under color of state law, committed intentional deprivations of constitutional rights under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983?

STATEMENT OF THE CASE

Petitioners filed separate complaints in the United States District Court, for the Northern District of Ohio, Eastern Division. These pleadings are self-explanatory (see Appendix at page 3 for the Amended Complaint in Krause and the Appendix at page 82 for the Complaint in Miller). Named as defendants in the Amended Complaint of Krause were Governor James Rhodes, Sylvester Del Corso and Robert Canterbury. Named as defendants in the Complaint of Elaine Miller were James Rhodes, Sylvester Del Corso, Robert Canterbury, Harry D. Jones, John E. Martin, Raymond J. Srp, Alexander Stevenson and Various Officers and Enlisted Men and Robert White. Defendants in each case filed motions to dismiss. These two cases and a third, the case of Sarah Scheuer v. James Rhodes, et al. (Petition for Writ of Certiorari, United States Supreme Court, Case No. 72-914) were consolidated for the purposes of determination of the motions to dismiss by the District Judge. The United States Sixth Circuit Court of Appeals also treated the three cases together despite differences of counsel and some differences in the causes of action that were raised. After disposition in the Court of Appeals, counsel in the Scheuer case promptly filed for certiorari while counsel for Krause and

Miller instead moved for rehearing by the United States Sixth Circuit Court of Appeals. A request for rehearing *en banc* was made.

The jurisdiction of the District Court was invoked as to the first cause of action alleged by Krause and by Miller because the claim arises under an Act of Congress, Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983 and under the equal protection and due process clauses of the United States Constitution. The jurisdiction of the District Court was invoked as to a second cause of action stated in the Amended Complaint of Krause and in the Complaint of Miller on the basis of diversity of citizenship, Krause and Miller being citizens of Pennsylvania and New York, respectively, and all of the defendants being citizens of Ohio.

The complaints allege facts which, if true, would establish claims under Title 42 U.S.C. §1983, and claims for wrongful death under Ohio Revised Code §5923.37, providing that no doctrine of privilege or immunity were established in bar. The Complaints are self-explanatory and their allegations need not be reiterated here in detail. In essence, the complaints allege that the defendants, acting individually and in conspiracy under color of state law, ordered untrained troops with loaded weapons onto the campus of Kent State University on May 4, 1970, and through their intentional actions Allison Krause and Jeffrey Miller were shot and killed. It is alleged that the defendants specifically intended to violate petitioners' constitutional rights and that the shooting of these students was the result of willful, wanton and malicious plans and actions brought about by the individual and conspiratorial conduct of these defendants. It is alleged that the decedents were a part of a peaceful gathering at the time of the shooting. Respondents did not answer the complaints

in either case. Instead they filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The motion to dismiss was granted by the District Court on June 2, 1971, and Krause and Miller (as well as Scheuer) separately appealed to the United States Sixth Circuit Court of Appeals. That court treated the cases together in reaching the judgment now raised for review.

Both the District Court and the United States Sixth Circuit Court of Appeals held that these damage suits against officials, based upon alleged acts in violation of the United States Constitution and to which a state was not a party of record (and against which no monetary recovery was sought) were in substance suits against the State of Ohio itself and thereby barred by the Eleventh Amendment. In addition, the United States Sixth Circuit Court of Appeals held that even if the case could be found as one against individuals, the defendants enjoyed the defense of absolute personal immunity or privilege, equivalent to that enjoyed by judges, which could be invoked to bar any suit such as the one brought by Krause and Miller. While the District Court based its opinion in part on supposed facts contrary to the allegations of the complaints, the United States Sixth Circuit Court of Appeals went even further, elaborating a few of the facts derived from news media, and accusing the lawyers who had drafted the complaints of deliberately attempting to deceive the courts. Neither the District Court nor the majority in the United States Sixth Circuit Court of Appeals gave any consideration to the diversity claims of these petitioners, as distinguished from their claims under U.S.C. Title 42, §1983. In his comprehensive dissent Judge Celebrezze specifically noted each of the errors in the majority opinion of the United States Sixth Circuit Court of Appeals, including the neglect of the diversity claims.

SUMMARY OF ARGUMENT

The Argument will be sumarized in accordance with the questions presented, and in the same order as they appear in the Argument itself which follows.

I. It is improper for a trial or an appellate court, in reviewing a motion to dismiss a complaint based upon claimed insufficiency of its allegations, to assume as true factual matters which are contrary to the allegations of the complaint.

The factual circumstances of these cases arise out of the fatal shootings of four students on the campus of Kent State University on May 4, 1970.

The complaints allege that the defendants, Governor James Rhodes, Generals Sylvester Del Corso, and Robert Canterbury and various National Guardsmen, acting under color of state law, both individually and in conspiracy, intentionally, willfully, wantonly, recklessly, callously and maliciously brought about the fatal shooting of Jeffrey Miller and Allison Krause, two students present at a peaceful gathering on the campus. The complaints allege that these actions were taken with the specific intent to violate petitioners' constitutional rights. The complaints allege further that the troops with loaded weapons were sent to the campus by the Governor and the Generals with the knowledge that there was no cause for sending them and that their presence created an imminent risk of injury and death to the students. Although not specifically alleged, it is a fact that the shootings took place in the midst of a heated political campaign in which the Governor, running on a so-called "law and order" platform, was a major contender in the Republican Senatorial Primary several days away. Many of the students were protesting the extension of the IndoChina conflict into Cambodia,

which had recently been made public. The Governor took command of the troops, going personally to Kent where, the day before the shootings, he publicly made intemperate urgings to the troops and generals. Defendant Canterbury was standing amongst the troops that did the actual firing on May 4, 1970. Both Generals Del Corso and Canterbury liberally invoked their constitutional privilege against self-incrimination in response to interrogatories propounded to them, and which are part of the record in this case. (Appendix, pages 67-80) Captain Srp, another defendant, who was an officer sharing responsibility for the conduct of Troop G which did the firing, also invoked the constitutional privilege against self-incrimination in reference to any occurrence on the day of May 4, 1970, the day of the shooting. His deposition is part of the record in this action.

In the face of these allegations, both the lower court and the circuit court concluded that there was a riot and insurrection, and Judge O'Sullivan specifically accused counsel of "contriving to hide rather than disclose the true background of the event." (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 31a.) Judge O'Sullivan took "judicial notice" of what he described as events "widely and publicly known across the nation" (Scheuer Appendix, page 30a) and asserted that the circumstances were "all a part of a state of insurrection that preceded and continued up to the very instant of the tragedy with which we deal." (Scheuer Appendix, page 38.) The district court asserted that the Governor had acted "in good faith." (Appendix, page 93.)

Not only are the factual assumptions of the lower courts contrary to the allegations in the complaints, they are also contrary to the Justice Department Summary of the FBI Investigation and the conclusion of the President's

Commission on Campus Unrest that the shootings were "unnecessary, unwarranted, and inexcusable." Not even the Governor himself claimed in his Proclamation of May 5, 1970 (the day after the shooting) that there was a "riot" or "insurrection" at Kent State University.

Petitioners contend that it was highly improper for the lower court to allow news media accounts to influence their review of the sufficiency of the complaints, thereby disregarding their allegations. This was an abuse of the rule of judicial notice, since the factual issues raised by the allegations of the complaints could not be summarily determined without presentation of evidence.

II. The Eleventh Amendment does not bar these actions.

Congress, in enacting the Civil Rights Act, intended to enforce the provisions of the Fourteenth Amendment which prohibit a *state* from depriving a citizen of due process of law and equal protection of the laws. The Eleventh Amendment is, in theory, qualified by the Fourteenth Amendment in the sense that claims against a state seeking redress for violations of due process and equal protection are not barred by sovereign immunity. To hold otherwise would remove judicial redress against a state whose agents violated a citizen's Fourteenth Amendment rights. While the Eleventh Amendment, in federal actions, extends sovereign immunity to the state with respect to other kinds of claims, it cannot extend sovereign immunity in federal court to states where deprivations of Fourteenth Amendment rights are claimed. The purpose of the Fourteenth Amendment was to limit and prohibit state action in matters of due process and equal protection. This limitation would be nullified if the Eleventh Amendment extended immunity to the states where deprivations of Fourteenth Amendment rights were claimed.

However, Congress has never exercised its full power to enact legislation enforcing the Fourteenth Amendment by allowing citizens to sue the states directly. But the Civil Rights Act does provide for damage suits against individuals who violate citizens' constitutional rights "under color" of state law. The present suits are against these defendants as individuals. They seek damages from them individually, and not from the state treasury. Any judgment rendered in these actions would in no way require any specific action or inaction on the part of any official or agent of the State of Ohio. Nevertheless, the circuit court asserts that the Eleventh Amendment bars these actions because they "directly and vitally affect the rights and interests of the state." If this standard were applied to actions brought under Section 1983, then almost all claims would be barred thereunder, because any claim against a state official can certainly be said in some sense to "directly and vitally affect the rights and interests of the state." The circuit court has proposed a radical departure from the established manner of determining which actions are against the state, and which actions are not. The prior decisions of this Court manifestly hold that claims against a state official for deprivation of federal constitutional rights are not barred by the Eleventh Amendment. The leading authority in this regard is *Ex Parte Young*, 209 U.S. 123 (1908). It is important to note that the intent of the Civil Rights Act was to deter unconstitutional misconduct, thereby bringing about a desirable effect upon state officials to protect the constitutional rights of citizens.

The fact that the instant actions are for damages as opposed to injunctive or declaratory relief is mandated by the circumstance of the deaths involved, and has no bear-

ing on the Eleventh Amendment's application one way or the other. The Civil Rights Act specifically provides for broad relief, including both legal and equitable relief.

III. None of these defendants are entitled to claim executive immunity as a bar to these suits.

If the Governor or the generals can claim executive immunity in these actions, then judicial review of the use of military troops against civilians will be removed. This places the Governor and the generals above the law; it gives them an unbridled license to commit unconstitutional acts—including the unconstitutional taking of life—with complete impunity. This is a dangerous proposition in a democracy, and a virulent threat to the rights of the citizenry. Immunity from suits brought under Section 1983 has been extended to judges (*Pierson v. Ray*, 386 U.S. 547 (1967)), and to legislators (*Tenney v. Brandhove*, 341 U.S. 367 (1971)), but never to the executive. It should not be extended to the executive, because to do so would emasculate all redress intended by Congress in enacting the Civil Rights Act. Moreover, the legislative and judicial immunities were premised upon strong common law traditions which existed prior to the enactment of Section 1983. No such tradition existed with respect to executive immunity. Also, an unconstitutional judicial decision can be corrected on appeal. A legislative action generally involves deliberation, and permits an aggrieved party the opportunity to persuade others of the legitimacy of his own viewpoint. Moreover, legislative activity inherently involves the exercise of First Amendment rights, which are entitled to particular protection. Finally, whatever official action a legislator takes does not carry with it the same irrevocable impact of a military action ordered and committed by executive officials.

Where a governor has acted unconstitutionally in the use of military troops—that is, in bad faith as alleged in these cases—his actions are subject to judicial review and redress, as against any claims of sovereign or executive immunity. In this regard, *Moyer v. Peabody*, 212 U.S. 78 (1909), and *Sterling v. Constantin*, 287 U.S. 378 (1932), are the leading authorities which support petitioners' contentions.

IV. The diversity claims state valid causes of action under Ohio Revised Code § 5923.37.

Ohio Revised Code § 5923.37 reads as follows:

> "When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act peformed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

A reading of the complaints reveals that the allegations state a cause of action under this Ohio statute. Neither the district court nor the circuit court discussed these claims. It was error to have dismissed them.

V. The United States is not a necessary party to this suit.

All of the actions alleged in the complaint were done by state officials. The mere fact that the United States, in some sense, was involved in the training of these troops does not make the United States a necessary party.

ARGUMENT

I. ON A DEFENDANT'S MOTION TO DISMISS A COMPLAINT BASED SOLELY UPON THE SUFFICIENCY OF THE ALLEGATIONS OF THAT COMPLAINT, MAY A TRIAL OR APPELLATE COURT ASSUME AS TRUE FACTUAL MATTERS WHICH ARE CONTRARY TO THE ALLEGATIONS OF THAT COMPLAINT?

In reaching its decision, the lower court on a motion to dismiss refused to accept as true the allegations of the complaints, as required upon such a motion. *Collins v. Hardyman,* 341 U.S. 651 (1951); *Ickes v. Virginia Colorado Development Corp.,* 295 U.S. 639 (1935); *Ickes v. Fox,* 300 U.S. 82 (1937). Instead, both the district court and the circuit court circumvented the allegations in the complaints by substituting their own factual assumptions, and then determined that the complaints as thus "amended" by the judges in finding facts contrary to the allegations, failed to state a cause of action. Thus, under this unprecedented procedure, both the district court and the circuit court actually failed to rule on the question of whether the pleadings filed by the petitioners stated a cause of action. Instead, the lower courts ruled on the question of whether the pleadings, as factually altered by the various judges, according to their notions of the occurrence based upon the newspaper accounts, stated a cause of action. The lower courts then found that *their* complaints (as opposed to the *petitioners'* complaints) did not state a cause of action.

This erroneous departure from the normal rules of procedure in and of itself justifies reversal in these cases.

Petitioners find it necessary to allude to some of the facts "found" by the lower courts without the benefit of properly presented evidence.

For example, the district court in its opinion (Opinion of the District Court, Appendix, page 93) specifically "found" the following:

> "The Governor of Ohio **had determined in good faith** that on the basis of the facts as they appeared that **riot and mob rule existed** at Kent State University and this Court cannot substitute its position for that of the Executive of the State of Ohio." (Emphasis added.)

Petitioners cannot understand how the district court knew that the Governor of Ohio "had determined **in good faith** that on the basis of the facts as they appeared that **riot and mob rule existed** at Kent State University"? There is absolutely nothing in the allegations of the complaints which would suggest that the Governor acted "in good faith" or that there was "riot and mob rule" at Kent State University at the time of the shooting. Quite to the contrary, the complaints specifically allege a specific intent on the part of the Governor to deprive the deceased students of their constitutional rights, and that the national guard under the command of defendant Canterbury, intentionally, willfully, wantonly and maliciously fired live ammunition at a peaceful gathering. Nevertheless, the district court continued to make frequent references to "riot and mob rule" to "quelling riot", to "an unrestrained mob" and to the use of the militia "in time of tumult" (Opinion of the District Court, Appendix, page 93). Having thus "found" without evidence presented that the Governor acted "in good faith", the district court then held that the complaints failed to state a claim for relief. It is obvious that whatever complaints were being construed or reviewed by the district court, they were not the complaints filed by the petitioners.

Unfortunately, the majority opinions in the circuit

court are similarly infected with factual conclusions drawn from various newspaper or other unknown accounts of the incident, since the majority judges in the circuit court had no more evidence before them than the district court judge. Nevertheless, Judge Weick writing for the majority makes the following facile references:

1. "The Governor of Ohio called out the Ohio National Guard **to suppress a riot in the city of Kent, Ohio, and on the campus of Kent State University.**" (Emphasis added.) (First sentence of the Opinion of Judge Weick, Scheuer Appendix, page 3a.)

2. ". . . These suits . . . were against the State of Ohio since they directly and vitally affected the rights and interest of the state in the performance of its highest function, namely, **the suppression of riots or insurrection and the protection of the public.**" (Emphasis added.) (Opinion of Judge Weick, Scheuer Appendix, page 4a.)

3. "It would not be conducive to good government to require the Chief Executive of either the nation or the state to defend himself in court, in a multitude of protracted actions, **because he called out troops to suppress riots or disorders which resulted in injury.**" (Emphasis added.) (Opinion of Judge Weick, Scheuer Appendix, pages 11-12a.)

4. "It would surely take a hardy executive to exercise his discretion by calling out troops **to suppress a riot or insurrection,** if he knew that in so doing the wisdom of his action could later be challenged in the courts." (Emphasis added.) (Opinion of Judge Weick, Scheuer Appendix, page 12a.)

5. "We ought not to limit the Governor in the exercise of his discretion to call out the National Guard **to suppress a riot or insurrection;** neither should we tell the military not to carry loaded weapons to protect the troops **when someone may shoot or throw rocks at them.**" (Emphasis added.) (Opinion

of Judge Weick, Scheuer Appendix, page 16a.)

6. "Not one Ohio case is cited in the dissent wherein the Governor, the officers or members of the Guard, have been held liable in a civil action **for acts performed in the suppression of insurrection.**" (Emphasis added.) (Opinion of Judge Weick, Scheuer Appendix, page 22a.)

7. ". . . nor should we make their actions in this respect **in times of emergency,** subject to judicial review." (Emphasis added.) (Opinion of Judge Weick, Scheuer Appendix, page 22a.)

Judge O'Sullivan in his concurring opinion, carries his "factual findings" to even greater lengths. Some examples are as follows:

1. "The pleadings in the case before us, **except by extravagant conclusional allegations and some dissembling,** strive to avoid threshold dismissal. (Emphasis added.) (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 28a.)

2. "Thus the pleaders would leave it that the Guard had no reason for being at Kent; that the Governor of Ohio with his soldiers entered upon the peace and quiet of Kent State campus as invaders, bent on killing innocent girls and boys . . . This writer does not hesitate to label such pleadings **obvious contrivances to get into court without pretense of fair averment of causes of action.**" (Emphasis added.) (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 28a.)

3. "The complaints, **with transparent purpose,** omit any mention of what had taken place in the City of Kent and on the campus of Kent State University." (Emphasis added.) (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 28a.)

4. "I believe also that **what had been going on at Kent State and its environs preceding the tragic deaths of these young people is so widely and pub-**

licly known across the nation that this court may take judicial notice of such events. 8 Cyc. Fed. Proc. § 26.226 (3rd ed. 1968)" (Emphasis added.) (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 30a.)

5. "The pleadings make no mention of the burning down of the ROTC Building on the campus of the University and the continued threats to persons and property—**all a part of a state of insurrection that preceded and continued up to the very instant of the tragedy with which we deal.**" (Emphasis added.) (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 30a.)

6. "The pleadings presented to the District Judge were **clearly contrived to hide rather than disclose the true background of the involved events**—an attempt to predicate causes of action **without disclosing their true subject matter.**" (Emphasis added.) (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, page 31a.)

Petitioners query how Judge O'Sullivan determined, without the benefit of evidence, the existence of a "state of insurrection that preceded and continued up to the very instant of the tragedy with which we deal?" How did Judge Weick determine, without the benefit of evidence, that there was a "riot" or "insurrection?" How could Judge O'Sullivan state that the pleadings "were clearly contrived to hide rather than to disclose the true background of the involved events?" How did Judge Weick reach the conclusion that the military may have required loaded weapons for protection "when someone may shoot or throw rocks at them"? How is it legally permissible for Judge O'Sullivan to take judicial notice of such events on the premise that they are "so widely and publicly known across this nation"? This is an outright abuse of the rule of judicial notice. Judicial notice was never

designed as a vehicle through which a magistrate reviewing the sufficiency of a complaint could substitute personal views gleaned from the news media for the rules of law and evidence comprising the most basic notions of due process. *Dominion Hotel Co. v. Arizona*, 249 U.S. 265 (1919); *Brown v. Spilman*, 155 U.S. 665 (1895); *Minnesota v. Barber*, 136 U.S. 313 (1890).

Again, the observation of Judge Celebrezze is painfully correct (Opinion of Judge Celebrezze, Scheuer Appendix, page 33a):

> "The majority opinion is nonetheless framed under the assumption that the violence and riotous conditions which, according to the media, may have prevailed on the Kent State Campus, have been established as proven facts for purposes of the present suits."

For a reviewing court to indulge in news media accounts as a substitute for evidence is altogether unjustified. The most passing glance at a diverse sampling of news media headlines instantly reveals the utter unreliability of such an approach to finding "facts" from the media.[1]

A still more revealing account is found in the con-

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[1] "GUARDSMEN WERE TIRED AND HARASSED, SAYS COLONEL" (Cleveland Press - May 5, 1970); "TROOPS LOST ALL THEIR COOL" (Cleveland Plain Dealer - May 5, 1970); "BULLETS UNSELECTIVE IN CLAIMING 4 LIVES" (Cleveland Plain Dealer - May 5, 1970); "SNIPER CLUE SIFTED AT KSU" (Cleveland Plain Dealer - May 6, 1970); "PENTAGON TRAINING RULES FROWN ON MASS GUNFIRE" (Cleveland Plain Dealer - May 6, 1970); "13 SECONDS TURNED SPRING AT KENT STATE INTO BLOODY ARENA OF DEATH, CHAOS" (Cleveland Plain Dealer - May 17, 1970); "TROOPS AT KENT AGREED TO SHOOT, REPORT CONTENDS" (Cleveland Plain Dealer - July 23, 1970 - New York Times Service); "FBI - NO REASON FOR GUARD TO SHOOT AT KENT STATE" (Akron Beacon Journal - July 23, 1970); "NIXON PANEL DUE AT KSU AUG. 19" (Cleveland Plain Dealer -

(Footnote continued on following page)

clusions drawn by the United States Department of Justice in its summary of the exhaustive FBI investigation, parts of which have been presented in the *New York Times,* (November, 1970), and in the Senate Congressional Record ("FBI Reports Guardsmen Committed Murder", Senate Congressional Record, July 31, 1970, pages 26707-8; "Murder at Kent State University", Senate Congressional Record, October 13, 1970, pages 36370-1; "S 4336 - Introduction of A Bill To Compensate the Survivers of the Kent State University Tragedy", Senate Congressional Record, September 14, 1970, page 31517; "Attorney General Mitchell and Justice Department Officials Deserve Credit for Thorough Impartial Investigation of Kent State Tragedy—Federal Grand Jury Investigation in Cleveland Next in Order", Senate Congressional Record, August 4, 1970, pages 27213-4; "Murder on Kent State University Campus", Senate Congressional Record, August 10, 1970, pages 27873-5). The entire summary is

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(Continued from previous page)

July 28, 1970); "2 IN GUARD 'WON'T TESTIFY'" (Cleveland Plain Dealer - August 20, 1970); "RHODES SHUNS HEARING AT KSU" (Cleveland Plain Dealer - August 20, 1970); "KENT LAWYER DENIES 'SHOOT ALL' REMARK" (Cleveland Plain Dealer - October 26, 1970); "CHURCH GROUP ON KENT: IT WAS MURDER" (Miami Herald - July 22, 1971); "STUDY SAYS GUARDSMEN PLOTTED TO SHOOT KENT STATE STUDENTS" (Washington Post - July 23, 1971); "CONGRESSMEN DEMANDING NEW KENT STATE INQUIRY" (New York Times - July 25, 1971); "WHEN IS IT APPROPRIATE FOR KENT STATE JUSTICE?" (Dayton Daily News - July 25, 1971); "CONSPIRACY CHARGED IN KENT KILLINGS" (Pittsburgh Forum - July 30, 1971); "JUSTICE QUIBBLES OVER KENT STATE" (Washington Post - August 23, 1971); "CHURCHES ASK U.S. - KSU PROBE" (Akron Beacon Journal - November 16, 1971); "KENT INDICTMENTS . . . THE SCALES OF JUSTICE ARE UNBALANCED" (Dayton Journal Herald - November 17, 1971); "MURDER AT KENT STATE" (Playboy Magazine - December, 1971); "KENT STATE: TOTAL BREAKDOWN IN OUR SYSTEM OF JUSTICE" (Horizon - December 3, 1971).

set forth in 119 Congressional Record, page E207-213, Daily Edition, January 15, 1973.

A number of these conclusions are set forth as follows:

1. "Just prior to the time the Guard left its position on the practice field, members of Troop G (107th Armoured Cavalry) were ordered to kneel and aim their weapons at the students in the parking lot south of Prentice Hall. They did so, but did not fire. One person, however, probably an officer, at this point did fire a pistol in the air . . .

The Guard was then ordered to regroup and move back up the hill past Taylor Hall."

2. "The crowd on top of the hill parted as the Guard advanced and allowed it to pass through, apparently without resistance. When the Guard reached the crest of Blanket Hill by the southeast corner of Taylor Hall at about 12:25 p.m., they faced the students following them and fired their weapons. Four students were killed and nine were wounded."

3. "Six Guardsmen, including two sergeants and Captain Srp of Troop G stated pointedly that the lives of the members of the Guard were not in danger and that it was not a shooting situation."

4. "We have some reason to believe that the claim by the National Guard that their lives were endangered by the students was fabricated subsequent to the event. The apparent volunteering by some Guardsmen of the fact that their lives were not in danger gives rise to some suspicions."

5. "[One guardsman] admitted that his life was not in danger and that he fired indiscriminately into the crowd. He further stated that the Guardsmen had gotten together after the shooting and decided to fabricate the story that they were in danger of serious bodily harm or death from the students."

6. "Also, a chaplain of Troop G spoke with many members of the National Guard and stated that they were unable to explain to him why they fired their weapons."

7. "No verbal warning was given to the students immediately prior to the time the Guardsmen fired."

8. "There was no request by any Guardsmen that teargas be used."

9. "There was no request from any Guardsmen for permission to fire his weapon."

10. "The Guardsmen were not surrounded."

11. "No Guardsman claims he was hit with rocks immediately prior to the firing."

12. "There was no sniper."

13. "The FBI has conducted an extensive search and has found nothing to indicate that any person other than a Guardsman fired a weapon."

14. "At the time of the shooting, the National Guard clearly did not believe that they were being fired upon."

15. "Each person who admits firing into the crowd has some degree of experience in riot control. None are novices."

16. "A minimum of 54 shots were fired by a minimum of 29 of the 78 members of the National Guard at Taylor Hall in the space of approximately 11 seconds."

17. "Five persons interviewed in Troop G, the group of Guardsmen closest to Taylor Hall, admit firing a total of eight shots into the crowd or at a specific student."

18. "Some Guardsmen (unknown as yet) had to be physically restrained from continuing to fire their weapons."

19. "Four students were killed, nine others were wounded, three seriously. Of the students who were killed, Jeff Miller's body was found 85-90 yards from the Guard. Allison Krause fell about 110 yards away. William Schroeder and Sandy Scheuer were approximately 130 yards away from the Guard when they were shot."

20. "Although both Miller and Krause had probably been in the front ranks of the demonstrators initially, neither was in a position to pose even a remote danger to the National Guard at the time of the firing. Sandy Scheuer, as best as we can determine, was on her way to a speech therapy class. We do not know whether Schroeder participated in any way in the confrontation that day."

21. No person shot was closer than 20 yards from the guardsmen. One injured person was 37 yards away, another, 75 yards; another 95 or 100 yards; another 110 yards; another 125 or 130 yards; another 160 yards; and the other, 245 or 250 yards.

22. "Seven students were shot from the side and four were shot from the rear."

23. "Of the 13 Kent State students shot, none, so far as we know, were associated with either the disruption in Kent on Friday night, May 1, 1970, or the burning of the ROTC Building on Saturday, May 2, 1970."

24. "As far as we have been able to determine, Schroeder, Scheuer, Cleary, MacKenzie, Russell and Wrentmore were merely spectators to the confrontation."

In addition to the FBI investigation, the events at Kent State University on May 4, 1970, were extensively investigated by the President's Commission on Campus Unrest, appointed by President Nixon on June 13, 1970. The Commission, in its report, found that the shootings

were "unnecessary, unwarranted, and inexcusable." Former United States Attorney General John Mitchell publicly stated his agreement with this factual conclusion of the President's Commission on Campus Unrest, more commonly known as the Scranton Commission, after its Chairman, former Governor William Scranton of Pennsylvania. Interestingly, the record in this case reflects the liberal invocation of the Fifth Amendment's privilege against self-incrimination by defendants Del Corso and Canterbury, which goes to emphasize the need for further discovery. (See Answers to Interrogatories, Appendix, pages 67-80.)

Petitioners are not presenting this material as necessarily positive or admissible proof of the truth of their allegations. This material is presented for the sole purpose of demonstrating the inappropriateness of the actions of the lower courts in refusing to accept as true the allegations of the complaint in reviewing their sufficiency on a motion to dismiss. The taking of judicial notice of the news media accounts, particularly by Judge O'Sullivan, was wholly unjustified, as has been already demonstrated. Where a prima facie case is alleged, a court reviewing a complaint may not disregard its allegations by substituting versions of events which are supposedly "widely and publicly known across the nation." Obviously, the various news media accounts presented herein by petitioners are just as "widely and publicly known across the nation", rendering both useless and dangerous any attempt at judicial notice of facts contrary to the allegations in the complaints.

Indeed, this Court has condemned the undue saturation of biased news media exposure in a community where a defendant is faced with a criminal charge. *Sheppard v. Maxwell*, 348 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963). If juries must decide issues of fact

solely upon admissible evidence, the courts too must shun the influence of the media in determining the legal sufficiency of complaints. Perhaps the best judicial observation in this regard was made by Justices Cardozo and Stone in their concurring opinion in *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934):

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer." 293 U.S. 194, 213.

II. DOES THE ELEVENTH AMENDMENT BAR A DAMAGE ACTION BROUGHT AGAINST THE GOVERNOR OF OHIO, AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD IN THEIR INDIVIDUAL CAPACITIES WHILE ACTING UNDER COLOR OF STATE LAW FOR THE INTENTIONAL DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER SECTION ONE OF THE CIVIL RIGHTS ACT OF 1871, 17 STAT. 13, 42 U.S.C. §1983, WHICH NEITHER NAMES THE STATE OF OHIO AS A PARTY DEFENDANT, NOR SEEKS TO RECOVER ANY DAMAGES PAYABLE THROUGH THE TREASURY OF THE STATE OF OHIO OR THROUGH ANY PUBLIC FUNDS?

The United States Sixth Circuit Court of Appeals affirmed the dismissal of these actions on the pleadings as follows (Opinion of Judge Weick, Scheuer Appendix, p. 4a):

> "The theory of the motions to dismiss was that these suits, although nominally against the Chief Executive and officers of the State, in substance and effect were against the State of Ohio since they directly and vitally affected the rights and interests of the state in the performance of its highest function, namely, the suppression of riots or insurrection and the protection of the public." (Emphasis added.)

However, as Judge Celebrezze observed in his dissent (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, p. 32a):

> "Indeed, the majority's ad hoc application of the Eleventh Amendment would appear to bar all suits under 42 U.S.C. §1983, with its requirement that defendants thereunder be shown to have acted under color of state law."

Petitioners contend that both the district court and the circuit court have unjustifiably overextended the bounds of the Eleventh Amendment in holding that these suits must be dismissed because they are "in substance and effect against the State of Ohio since they directly and vitally affected the rights and interests of the state. . ." (Emphasis added).

Petitioners suggest that no such judicial test has ever been applied by this Court in determining the propriety of any action brought under the conspiracy or personal liability sections of the Civil Rights Act, for to do so would virtually cripple the remedy that statute was intended to provide.

The Fourteenth Amendment by its plain terms, limits the power of the state. It mandates that *no state* shall deprive any person of due process of law or equal protection of the laws. The Eleventh Amendment provides that *no state* shall be suable in a federal court. Thus, while on the one hand the Eleventh Amendment would appear to bar an action against the state in a federal court, the Fourteenth Amendment would appear to provide for an action against a state, at least to the extent that a state violates a citizen's rights to due process of law and to equal protection of the laws.

Moreover, the Fourteenth Amendment contains, in Section 5 thereof, a specific enforcement section: "The

Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

This power of Congress to legislate and *enforce* the provisions of the Fourteenth Amendment to prevent a *state* from depriving a citizen of due process of law or equal protection of the laws is buttressed by the Necessary and Proper Clause of Article I, Section 8 of the Constitution.

Thus, in theory, Congress has the power to enact legislation providing for redress directly against a state in instances where a state violates a citizen's right to due process of law and to equal protection of the laws. This is so because it must be assumed that Congress understood the existence and meaning of the Eleventh Amendment when, over 50 years later, it enacted the Fourteenth Amendment. The enactment of the Fourteenth Amendment should be viewed, by implication, as a qualification of the earlier Eleventh Amendment inasmuch as the Fourteenth Amendment was, by its terms, specifically designed to limit state power and to authorize appropriate legislation to enforce those limitations on state power insofar as the federal rights of due process and equal protection were involved.

This court discussed the relationship between the Eleventh Amendment and the Fourteenth Amendment in *Ex Parte Young*, 209 U.S. 123 (1908). In that case, a suit in equity was brought by stockholders of a railroad against the Attorney General of Minnesota seeking to enjoin the Attorney General from enforcing state legislation which the stockholders contended was violative of due process of law and equal protection of the laws guaranteed in the Fourteenth Amendment—this by virtue of the rates and penalties contained in the state legislation. The Minnesota Attorney General claimed that the action

was barred by the Eleventh Amendment because it was "in truth and effect a suit against the State of Minnesota." 209 U.S. 123, 132. Thus, he claimed that the federal court, which had enjoined the enforcement of the legislation, did not have jurisdiction to hold him in contempt for disregarding the injunction by enforcing the legislation in the Minnesota State Courts.

This Court, in holding that the action was not a suit against the State of Minnesota in violation of the Fourteenth Amendment specifically noted therein in citing language in the prior decision of *Pennoyer v. McConnaughy*, 140 U.S. 1, 9:

> "But the general doctrine of *Osborn v. Bank of the United States*, that the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from." 209 U.S. 123, 152.

This Court in *Ex Parte Young, supra*, was not required to reach the issue of whether an action directly against a state to redress state deprivations of Fourteenth Amendment rights was barred by the Eleventh Amendment, since this Court found the action against the Minnesota Attorney General to be against him individually and not against him in his official capacity. Thus, it was not an action against the state. As this Court stated in *Ex Parte Young, supra:*

> "If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official

or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States . . . If the question of unconstitutionality with reference, at least, to the Federal Constitution be first raised in a Federal court that court, as we think is shown by the authorities cited hereafter, has the right to decide it to the exclusion of all other courts." 209 U.S. 123, 159.

The question of whether Congress has the power to enforce the prohibitions applicable to the states expressed in the Fourteenth Amendment by enacting appropriate legislation for redress in federal court directly against a state has never been squarely resolved by this Court.

However, this Court has held expressly and by implication in several decisions that in suits against state officials, wherein it is claimed that those state officials violated the Fourteenth Amendment rights of citizens, the Eleventh Amendment will not bar such a suit. *Sterling v. Constantin*, 287 U.S. 378 (1932); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Prout v. Starr*, 188 U.S. 537 (1903); *General Oil Co. v. Crane, Inspector of Coal Oil*, 209 U.S. 211 (1908).

Thus, in *Sterling v. Constantin, supra*, this Court specifically rejected the Eleventh Amendment immunity claim of Governor Sterling of Colorado and General Wolters of the Colorado Militia:

"The suit is not against the state. The applicable principle is that, where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons

injured may have appropriate relief." 287 U.S. 378, 393.

More recently, in *Griffin v. County School Board of Prince Edward County, supra,* the same principle was applied to a suit brought on behalf of negro school children against the county school board and against state and county officials which alleged racial discrimination:

> "It is contended that the case is an action against the State, is forbidden by the Eleventh Amendment, and therefore should be dismissed. The complaint, however, charged that state and county officials were depriving petitioners of rights guaranteed by the Fourteenth Amendment. It has been settled law since Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment." 377 U.S. 218,228.

In *Prout v. Starr, supra,* this Court specifically addressed itself to the relationship between the Eleventh and Fourteenth Amendments:

> "Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by state enactments." 188 U.S. 537, 543.

Similarly, in *General Oil Co. v. Crane, Inspector of Coal Oil, supra,* this Court held:

> "It seems to be an obvious consequence that as a State can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty from which it is exempt without its consent in the state tribunals, and exempt by the Eleventh Amendment of the Constitution of the United States, in the national tribunals. The error is in the universality of the conclusion, as we have seen. Necessarily

to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a State to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which if directed at state action could be nullified as to much of its operation. And it will not do to say that the argument is drawn from extremes. Constitutional provisions are based on the possibility of extremes. There need not, however, be imagination of extremes, if by extremes be meant a deliberate purpose to prevent the assertion of constitutional rights. Zeal for policies, estimable, it may be, of themselves, may overlook or underestimate private rights. The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as in a kind of outlawry. See *Ex parte Young, ante*, p. 123, where this subject is fully discussed and the cases reviewed." 209 U.S. 211, 226-227.

However, if this Court should conclude—as petitioners contend it should not—that the instant action is for any reason directly against the State of Ohio, then petitioners urge that nonetheless the Eleventh Amendment does not bar *this particular action* because *this particular action* seeks redress under the provisions of the Fourteenth Amendment which cannot be abrogated or rendered meaningless by the prior Eleventh Amendment, which has been qualified by Fourteenth Amendment.

In any event, no such problem of conflict between the Eleventh and Fourteenth Amendments is raised by

these actions. Congress apparently did not enact a law providing for redress for violations of due process of law and equal protection of the laws directly against a state, although it could have. Rather, the Civil Rights Act stopped short of this by providing for an action for redress at law or in equity against every person acting "under color" of any state law who violates a citizen's federal constitutional rights. Congress clearly had the authority to enact this legislation. The several historical analyses made by various justices of this Court of the Congressional intent surrounding its enactment all reveal the circumstances which, in 1871, compelled Congress to enact the legislation.

In *Mitchum v. Foster*, 92 S. Ct. 2151 (1972), Justice Stewart pertinently analyzed the Congressional intent in the enactment of the Civil Rights Act:

> "As a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece, the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed.2d 492; *McNeese v. Board of Education*, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed.2d 622; *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161; *Zwickler v. Koota*, 389 U.S. 241, 245-249, 88 S. Ct. 391, 383-396, 19 L. Ed.2d 444; Flack, The Adoption of the Fourteenth Amendment (1908); tenBroek, The Anti-Slavery Origins of the Fourteenth Amendment (1951). Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." 92 S. Ct. 2151, 2160.
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> "Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in

an attempt to remedy the state courts' failure to secure federal rights." 92 S. Ct. 2151, 2161.

* * * * *

"This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." 92 S. Ct. 2151, 2162.

* * * * *

"Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. **The very purpose of §1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'** *Ex Parte Virginia*, 100 U.S. 339, 346, 25 L. Ed. 676." (Emphasis added.) 92 S. Ct. 2151, 2162.

In *Monroe v. Pape*, 365 U.S. 171 (1961), Justice Douglas, writing for this Court, asserted:

"The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." 365 U.S. 171, 179.

* * * * *

"Opponents of the Act, however, did not fail to note that by virtue of §1 federal courts would sit in judg-

ment on the misdeeds of state officers. Proponents of the Act, on the other hand, were aware of the extension of federal power contemplated by every section of the Act." 365 U.S. 171, 182.

In *Zwickler v. Koota,* 389 U.S. 245 (1967), Justice Brennan discussed the historical intent of Congress in enacting the Civil Rights Act as follows:

"During most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws. The only exception was the 25th section of the Judiciary Act of 1789, 1 Stat. 85, providing for review in this Court when a claim of federal rights was denied by a state court.

But that policy was completely altered after the Civil War when nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with enormously increased powers." 389 U.S. at 245.

* * * * *

"Indeed, even before the 1875 Act, Congress, in the Civil Rights Act of 1871, subjected to suit, '[e]very person who, under color of any statute * * * subjects, or causes to be subjected, any citizen of the United States or other person * * * to the deprivation of any rights * * * secured by the Constitution and laws * * *', 42 U.S.C. §1983; and gave the district courts 'original jurisdiction' of actions '[t]o redress the deprivation, under color of any State law * * * of any right * * * secured by the Constitution * * *.' 28 U.S.C. §1343 (3).

In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." 389 U.S. 245, 247.

Having thus examined the background of the Civil Rights Act and the light and circumstances of its Congressional enactment in 1871, it is similarly pertinent to review the historical background of the Eleventh Amendment as it relates to actions brought under the Civil Rights Act. A recent discussion by this Court along these lines is found in the opinion (concurring in part and dissenting in part) of Justice Brennan, joined by Justices White and Marshall, in *Perez v. Ledesma*, 401 U.S. 82 (1971):

> "*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution. During the years between Osborn and Young, and particularly after the Civil War, Congress undertook to make the federal courts the primary guardians of constitutional rights. This history was reviewed in Zwickler v. Koota, 389 U.S., at 245-249, 88 S. Ct., at 393-394, 396, 19 L. Ed.2d 444. The principal foundations of the expanded federal jurisdiction in constitutional cases were the Civil Rights Act of 1871, 17 Stat. 13, which in §1 empowered the federal courts to adjudicate the constitutionality of actions of any person taken under color of state statute, ordinance, regulation, custom, or usage, see 42 U.S.C. §1983, 28 U.S.C. §1343 (3), and the Judiciary Act of 1875, 18 Stat. 470, which gave lower federal courts general federal-question jurisdiction, see 28 U.S.C. §1331. These two statutes, together, after 1908, with the decision of Ex parte Young, established the modern framework for federal protection of constitutional rights from state interference. That framework has been strengthened and expanded by subsequent acts of Congress and subsequent decisions of this Court." 401 U.S. 82, 106.

The effect of the unprecedented holding of the circuit court was aptly described by Judge Celebrezze in dissent

(Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, p. 39a):

> "To hold that the present suits against state officials under Section 1983 are barred by the Eleventh Amendment would in effect overrule the Supreme Court's holding in Ex Parte Young and destroy Section 1983 as a tool by which federal courts are to guard against state interference with constitutional rights."

Let there be no mistake about it. Part of the motivation of the majority in the circuit court was an apparent personal distaste for the Civil Rights Act itself. This becomes apparent in reviewing the language of Judge O'Sullivan who wrote in the opening portion of his concurring opinion as follows (Concurring Opinion of Judge O'Sullivan, Scheuer Appendix, p. 27a):

> "In this case, we deal again with the ever-widening employment of Section 1983 for a purpose 'not plainly apparent from its language,' as such language was employed by the Congress when it adopted the Section in 1871 to combat some of the wrongs of our post-Civil War society. Currently, however, many courts have provided Section 1983 with new uses and much popularity—crowding today's courts with such volume of claimed causes of action as to seriously impair the judiciary's ability to meet its total burden of protecting American society."

If the decision below is permitted to stand, then this Court will have affirmed what Judge Celebrezze termed "the destruction of Section 1983 as a tool against which federal courts are to guard against state interference with constitutional rights."

Judge Celebrezze is correct in his analysis of the failure of the majority judges below "to recognize the status of these suits and the precedential effects of their ill-ad-

vised pronouncements." (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, p. 33a.)

These suits were dismissed on the pleadings without any evidence being taken. They are not suits against the state itself. They do not seek any injunctive relief. These suits do not seek to require or to prohibit any action by the State of Ohio or by any of its officials now or in the future. A damage judgment for petitioners, if rendered in these lawsuits, would in no way require any payment from the state treasury, or any action or inaction by any state official. Indeed, many of the defendants, including the governor and the commanding generals, are no longer officials of the State of Ohio. The petitioners seek only damages, not to be satisfied from the treasury of the State of Ohio, but from the individuals themselves. Within the permissible rules of general, notice pleading—compelled to some extent by a lack of discovery at the time of pleading—the petitioners allege that the defendants, both in conspiracy and individually, committed willful and wanton actions specifically intending to violate the petitioners' constitutional rights which led to and brought about as intended, the malicious shooting and killing of innocent students on a college campus without any justification whatsoever. **At no time did the defendants request by motion a more definite or certain statement on the pleadings, as was available to them under the Federal Rules of Civil Procedure, Rule 12(e).**

The State of Ohio has immunized itself from suits for redress in its own courts arising out of this same tragic incident. Mr. Krause attempted to persuade the Ohio courts that its doctrine of sovereign immunity was contrary to the Federal Constitution. Notwithstanding a favorable ruling to that effect by the Cuyahoga County Court of Appeals, *Krause v. State*, 28 Ohio App.2d 1 (1971),

the Ohio Supreme Court reversed, *Krause v. State*, 31 Ohio St.2d 132 (1972), reinstating the antiquated sovereign immunity doctrine on both state and federal grounds. This Court refused to hear the appeal on its merits (34 L. Ed.2d 506), and also denied a Petition for Re-Hearing (35 L. Ed.2d 208 (1972)).

There is a limited redress under Ohio Revised Code §5923.27, which states:

> "When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

However, such a limited right in no way provides the kind of redress contemplated and made available by Congress in the Civil Rights Act. In effect, then, the only meaningful legal remedy left is the present suit under 42 U.S.C. §1983. **If this remedy is removed, there will be no redress of any kind available to petitioners,** notwithstanding the clear terms of the Fourteenth Amendment which command that "no state shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The respondents and the lower courts contend that the Eleventh Amendment bars these actions, not because the state is a party defendant, not because the state treasury may be forced to pay a judgment, not because the state or any of its officials will be required by any judgment rendered in these suits to do or not to do any act, not because the complaints fail in substance to allege violations of due process of law or equal protection of the

laws, but because these suits "directly and vitally affected the rights and interests of the state" and are thus "in substance and effect" against the state.

The phrase utilized by the lower courts—"directly and vitally affected the rights and interests of the state" —strikingly dramatizes a radical departure from the present law. For if the question of whether a suit under the Civil Rights Act is barred by the Eleventh Amendment is to be determined by whether the suit "directly and vitally affects the rights and interests of the state", then the entire basis of the Civil Rights Act is subverted. Who can ever say when and how in any given case the rights and interests of the state are "directly and vitally affected"? And wherein lies the authority for the brazen implication that, in any event, the "directly and vitally affected rights and interests of the state" are automatically accorded preferential consideration to the "directly and vitally affected rights and interests of the individual"? Here we speak of the right of individuals to life, and to be free of maiming injury, including in the case of one student paraplegia resulting from being shot in the spine. This is to say nothing of First Amendment rights to assemble peacefully on a college campus, to protest the War in Cambodia, or the right to walk between a dormitory and a classroom without being interrupted by a fatal national guard bullet through the head. It is respectfully submitted by petitioners that the lower courts overindulged at the pleading stage in the "rights and interests of the state," claimed to exist in the Eleventh Amendment, to the disastrous neglect and indifference to the "rights and interests of the individual" as expressed in the Fourteenth Amendment, the Civil Rights Act, and numerous decisions of this Court.

In reality, there is no tenable way of determining when and under what circumstances the interests of the

state are "directly and vitally affected". Respondents claim, along with the lower courts, that petitioners' actions "directly and vitally affect" the State of Ohio because, in the words of Judge Weick, "we ought not to deter the Chief Executives of either the state or the nation in the *unflinching* performance of their duty to protect the public nor should we make their actions in this respect in times of emergency subject to judicial review." (Emphasis, the Court's.) (Opinion of Judge Weick, Scheuer Appendix, p. 22a.) This, indeed, constitutes advocacy of a revolutionary doctrine totally alien to our traditional constitutional protection accorded to individual citizens. The doctrine thus enunciated by Judge Weick would unleash and legalize autocratic, uncontrolled powers of would-be dictators or tyrants. How distinguishable are such unrestrained powers from the alien philosophies of foreign despots who executed their citizens under the banner of "protecting the public?". Here, then, is the crux, the very heart of this appeal. Should excesses of the executive power be exempt from judicial review upon the bare allegation that their commission is in times of "emergency"? We think not in America.

It can be readily seen that this same reasoning could be applied to bar any action under Section 1983, not just one against the governor, commanding generals and national guardsmen. This is so because there is no civil rights action which does not in some sense "directly and vitally affect the state"—or does not deter some state official from "the unflinching performance of his duties". Indeed, a more logical argument is that 42 U.S.C. §1983 was intended by Congress to "directly and vitally affect" the state, and to deter state officials, insofar as the performance of their duties infringed the constitutional rights of citizens.

A review of the cases illustrates the danger. Could it not easily be said in *Monroe v. Pape, supra,* that individual police officers would be deterred by that action from the "unflinching performance of their duties"? Did the suit against city commissioners, counsel for the city, the sheriff, the police chief, the state's attorney and others in *Egan v. City of Aurora,* 365 U.S. 514 (1960) "vitally affect" the municipality and the state? Was the state "directly and vitally affected" in *McLaughlin v. Tilindis,* 398 F.2d 287 (7th Cir. 1971) when the superintendent of schools and elected members of the school board were sued in a damage suit under the Civil Rights Act? What "vital effect" occurred to the state in *Sostre v. McGinnis,* 442 F.2d 178 (2nd Cir. 1971), when suit was brought for damages against state administrative officials under the Civil Rights Act? Can the same question not be raised as to the "vital effect" on the state in *Alexander v. Nosser,* 438 F.2d 183 (5th Cir. 1971) *modified on other grounds* 456 F.2d 835 (en banc), when actions under Section 1983 were brought against the police chief, the fire chief, and the prison warden? In *Carter v. Carlson,* 447 F.2d 358, 365 (D.C. Cir. 1971) *cert. granted sub nom. District of Columbia v. Carter,* 404 U.S. 1014 (1972), to what extent were the police captain and police chief deterred from the "unflinching performance of their duties" by that action brought against them under Section 1983? And in the damage action brought against the police officer in *Jenkins v. Averette,* 424 F. 2d 1228 (4th Cir. 1970), were the rights and interests of the state "directly and vitally affected" in that action?

It can be readily seen from a cursory examination of the decisions under the Civil Rights Act that the radical proposition of the lower courts, injecting the bar of the Eleventh Amendment on the basis of the presumed ef-

fect of a lawsuit against the state, wholly undermines and unravels the entire purpose and effect of 42 U.S.C. §1983. This Court should feel obligated, as it has in the past, to render meaningful and effective the purpose and intent of an Act of Congress adopted pursuant to the express provisions of the Fourteenth Amendment. The wording of Section 1983 is broad and expansive and does not admit of any exceptions when it states that liability should attach to "EVERY person," making no special exceptions for governors, generals or national guardsmen. And certainly neither the Fourteenth Amendment nor the Civil Rights Act make any exceptions for actions which "directly and vitally affect" the state. In these times of unrest and dissension it may seem stringent to allow judicial review in damage suits of the actions of state officials. But the wisdom, let alone the law, regarding such judicial review should be apparent. To allow a chief executive or his commanding generals to be beyond judicial review, in effect, places such officials above the law, providing for them a kind of executive immunity which Congress never intended, and which the law does not permit. How often it is said that the duty of this Court is not so much to reexamine the wisdom of a Congressional enactment, but rather to interpret it and to effectuate its meaning.

Moreover, the fact that these are actions seeking damages as opposed to equitable relief hardly merits any difference in treatment. An injunction has no meaning as a remedy to these petitioners after a death (or injury) has already occurred. As this Court noted in *Sterling v. Constantin, supra:*

> "The argument of appellants intimates, while it reserves the question, that it may be possible for the courts to call upon the Governor, after the alleged emergency has passed, to account for what he has done, but that they may not entertain a proceeding

for injunction. *The suggestion confuses the question of judicial power with that of judicial remedy.*" (Emphasis added) 287 U.S. 378, 403.

Similarly, in *Stefanelli v. Minard*, 342 U.S. 117 (1951), this Court held:

> "And under the very section now invoked, [§1983], we have withheld in equity even when recognizing that comparable facts would create a cause of action for damages. Compare *Giles v. Harris*, 189 U.S. 475, 23 S. Ct. 639, 47 L. Ed. 909 with *Lane v. Wilson*, 307 U.S. 268, 59 S. Ct. 872, 83 L. Ed. 1281." 342 U.S. 117, 122.

The Court's attention is additionally directed to the decision of the United States Sixth Circuit Court of Appeals in *Nelson v. Knox*, 256 F.2d 312, 314-15 (6th Cir. 1956).

The Civil Rights Act itself places damages on an equal footing with other remedies insofar as it provides for "an action at law, suit in equity, or other proper proceeding for redress." The language of the statute suggests a congressional intent to open the broadest possible avenues for redress.

A long line of decisions of this Court amply demonstrates the basic interpretation of the Eleventh Amendment in light of constitutional claims which have been developed and adhered to for a century. The teaching of those decisions is essentially that where the satisfaction of a judgment would be from the treasury of the state, then the action is against the state and is thus barred by the Eleventh Amendment; or, in the case of equitable relief, where the action itself would require or prohibit a specific act by the state, then the action is similarly determined to be against the state and thus barred by the Eleventh Amendment. *However, where the action is against the state officer in his individual or "ministerial"*

capacity for an alleged violation of federal constitutional rights, then the action is not considered to be one against the state; rather, it is viewed as an action against the individual, not barred by the Eleventh Amendment. In Re Ayers, 123 U.S. 443 (1887); *Fitts v. McGhee,* 172 U.S. 516 (1899); *Ex Parte Young,* 209 U.S. 123 (1908); *Ex Parte New York,* 256 U.S. 490 (1921); *Missouri v. Fiske,* 290 U.S. 18 (1933); *Ford Motor Co. v. Department of Treasury of State of Indiana,* 323 U.S. 459 (1944); *Larson v. Domestic & Foreign Corp.* 337 U.S. 682 (1949); *Georgia Railroad and Banking Co. v. Redwine, State Revenue Commissioner,* 342 U.S. 299 (1952); *Dugan v. Rank,* 372 U.S. 609 (1963).

A review of the aforementioned authorities quickly reveals the long-standing rule of law regarding the Eleventh Amendment. In *In Re Ayers, supra,* a lawsuit was brought against state officers and agents having no personal interest in the subject matter, who were sued in their representative capacities, wherein the requested relief was for a decree ordering acts constituting the specific performance of an alleged contract of the state. Clearly, this suit by its direct operation and effect would have potentially required specific actions by state officials as a result of any judgment rendered. Notwithstanding the Eleventh Amendment bar to this suit, this Court specifically stated:

> "The Court does not intend to impinge upon the principle which justifies suits against individual defendants who, under color of the authority of unconstitutional state legislation, are guilty of personal trespasses and wrongs." 123 U.S. 443, 444.

In *Fitts v. McGhee, supra,* suit was brought to restrain the criminal prosecution by a state on the claim that the criminal statute did not set forth reasonable com-

pensation tolls for the use of a particular bridge. Although this Court held such suit to be barred by the Eleventh Amendment (again an action which would directly operate to specifically prohibit and/or require actions by state officials), this Court specifically noted as follows:

> "If their officers commit acts of trespass and wrong to the citizen, they may be individually proceeded against for such trespasses or wrongs." 172 U.S. 516, 525.

This Court further noted as follows:

> "[The Eleventh Amendment] must be held to cover not only suits brought against a State by name, but those also against its officers, agents and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates. But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, *are guilty of personal trespasses and wrongs,* nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest." (Emphasis added.) 172 U.S. 516, 525.

In *Ex Parte New York, supra,* the action involved damage suits brought against the Superintendent of Public Works of the State of New York. The suit sought damages directly from the state treasury. In holding that this action was barred by the Eleventh Amendment this Court specifically noted as follows:

> "There is no suggestion that the Superintendent was

or is acting under color of an unconstitutional law, or otherwise than in the due course of the constitution and laws of the State of New York." 256 U.S. 490, 501-2.

In *Missouri v. Fiske, supra,* the action therein sought an injunction against the State of Missouri to prohibit it from prosecuting probate court proceedings in a Missouri State court. It was a suit by a relative of a decedent to determine and quiet a remainder interest and to obtain an accounting. Again, it can be seen that the relief sought was such as to directly prohibit state officials from performing a specific act, namely, prosecuting a lawsuit in its own court. Similarly, in barring this action on the basis of the Eleventh Amendment this Court specifically held as follows:

"The ancillary and supplemental bill is brought by the respondents directly against the state of Missouri. It is not a proceeding within the principle that suit may be brought against state officers to restrain an attempt to enforce an unconstitutional enactment. That principle is that the exemption of states from suit does not protect their officers from personal liability to those whose rights they have wrongfully invaded." 290 U.S. 18, 20-21.

In *Ford Motor Co. v. Department of Treasury of State of Indiana, supra,* suit was brought to recover from the state treasury gross income tax which had been paid by the taxpayers. This taxpayers' suit was barred by the Eleventh Amendment, as it can obviously be seen that the action sought recovery directly from the treasury of the State of Indiana. Again, as in all of the previous decisions, this Court noted as follows:

"But, they [the defendants, namely, the governor, treasurer and auditor of the state] were joined as the collective representatives of the state, not as in-

dividuals against whom personal judgment is sought." 323 U.S. 459, 463-464.

In *Dugan v. Rank, supra,* an action was brought by riparian and overlying owners to enjoin officers of the United States Bureau of Reclamation from impounding water in a federal dam in the San Joaquin River—allegedly in contravention of claimed rights to the beneficial use of those waters of the river below the dam. In holding that the action was barred as against the United States, this Court followed its prior precedents in noting that any decree granted in the case would have required the expenditure of public funds by the United States, as well as requiring the doing of a specific act by the United States, namely to dispose of irrigation water. However, as in previous decisions, this Court in *Dugan* specifically referred with approval to the language in the prior decision of *Larson v. Domestic & Foreign Corp., supra,* as follows (at p. 701 of *Larson*):

> "The action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for a specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." (Emphasis added.) 372 U.S. 609, 622.

By striking contrast, this Court has similarly held that where the lawsuit challenges an allegedly *unconstitutional* state action or state statute, Eleventh Amendment immunity does not apply. Thus, the action of the Minnesota Attorney General in attempting to enforce an allegedly unconstitutional state statute was the principal subject of suit in federal court for equitable relief, and not barred by the Eleventh Amendment. *Ex Parte Young,*

supra; similarly in *Georgia Railroad and Banking Co. v. Redwine, State Revenue Commissioner, supra,* wherein a citizen challenged the constitutionality of collecting taxes that allegedly impaired the obligation of contract, this Court refused immunity under the Eleventh Amendment in holding that "a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the state." 342 U.S. 299, 304.

As Justice Brennan wrote in his separate opinion in *Perez v. Ledesma, supra,* as recently as 1971, "Ex Parte Young was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." 401 U.S. 82, 106.

There can be little doubt that the present action falls demonstrably within that category of decisions which are not barred by the Eleventh Amendment. The present action does not seek a money judgment to be satisfied by the state treasury, nor does it seek to require or prohibit any act by the state. The suit, to the contrary, is against individual state officials for alleged violations of petitioners federal constitutional rights. The manifest weight of authority of this Court holds that such an action is not barred by the Eleventh Amendment. By the same token, there is no authority for the proposition advanced by the lower courts that the act must be barred by the Eleventh Amendment because "the rights and interests of the state are directly and vitally affected." Petitioners emphasize that the present interpretation by this Court of the scope of the Eleventh Amendment provides a workable standard easily applicable in all cases. For example, it is far less difficult in damage actions to determine whether satisfaction is ultimately to be sought from the state treasury or from the individual, than to determine whether the

"rights and interests of the state are directly and vitally affected." Moreover, the present authorities are consistent with the purposes of the Eleventh Amendment, in light of its history, whereas the approach of the lower courts would distort that purpose and more seriously, create a conflict with the purposes of the Fourteenth Amendment.

There is no good reason for this Court to depart from its long established interpretation of the Eleventh Amendment, while on the other hand there is considerable basis for continuing to adhere to the traditional interpretation. To depart from the present interpretation of the Eleventh Amendment's scope, as is suggested in this case by the lower courts and by respondents, would emasculate the guarantees of the Fourteenth Amendment. Clearly, the Fourteenth Amendment and the Civil Rights Act were designed by Congress to interpose the federal courts between the state and the citizen. To reject judicial review and thereby judicial remedy is to remove the protection of the federal courts provided by Congress for the benefit of citizens injured by the unconstitutional excesses of state officials. The approach to Eleventh Amendment immunity proposed by the lower courts really amounts to an expansion of that amendment far beyond its historical purpose or practical justification. This expansion, if permitted by this Court, will constitute an intrusion of the Eleventh Amendment into the sphere of protection created by the Fourteenth Amendment (and by the Civil Rights Act).

What it boils down to is simply this: these petitioners are unable to seek redress against the State of Ohio in state court, the State of Ohio having immunized itself from such suits. Moreover, under present interpretations of the Eleventh Amendment, it would appear to be un-

realistic for these same petitioners to seek any relief directly against the State of Ohio in federal court. Thus, these actions against the governor, the generals and the guardsmen are the only available form of relief left to these petitioners for alleged violations of their constitutional rights. It has always been a fundamental precept of the law and of this Court that for every wrong there shall be a remedy. Nothing is more rudimentary in the concept of due process of law. How much more pressing is the need when the alleged wrong is a violation of the Federal Constitution under the most shocking kinds of circumstances.

It is meaningless to talk about the guaranteed rights to freedom of expression, association and assembly, and to life and liberty themselves in the abstract as being part of due process of law guaranteed in the Fourteenth Amendment, unless these fundamental rights can be effectively realized and exercised, and their violation effectively redressed. If state officials, acting under color of state law, can individually and in conspiracy, illegally, wantonly, intentionally, maliciously, and unconstitutionally shoot and kill a student on a college campus without any justification whatsoever, and thereafter be entitled to claim immunity from any redress in a federal court for the wrong allegedly committed, then the guarantees of due process and equal protection in the Fourteenth Amendment are meaningless and inoperative statements which exist only on a piece of paper. By depriving the victim of a remedy, the victim is deprived of the right itself.

This Court has time and time again reached decisions designed to insure the realization of a guaranteed constitutional right by judicially protecting its exercise, and fashioning a remedy where the right has been violated.

For example, over fifty years ago this Court decided in *Weeks v. United States*, 232 U.S. 383 (1914), that the exclusionary rule should apply to federal prosecutions. This Court there said at 232 U.S. 383, 393:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

The logic of this rule became apparent where in *Mapp v. Ohio*, 367 U.S. 643 (1961), this same reasoning was applied to the states. Over ten years ago, in *Mapp, supra*, this Court explained its meaning, the spirit of which applies to this present case:

> "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." 367 U.S. 643, 656.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963) (now extended to apply to misdemeanors in the recent decision of *Argersinger v. Hamlin*, 407 U.S. 25 (1972)), this Court recognized that it was meaningless to hold forth a constitutional right to counsel, when that right was unavailable to the indigent accused. Earlier, in *Powell v. Alabama*, 287 U.S. 45 (1932), this Court held that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." (287 U.S. 45, 68-9). Eventually, the right to counsel was further protected in *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), where this Court then felt that the right to counsel, in order to be meaningful, included the right to be informed of the right to counsel. What did all of the

procedural rights in a court trial mean, when the trial had already been held in the police station, so, in effect, this Court reasoned.

In *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Douglas v. California*, 372 U.S. 353 (1963), this Court held that the right to an appeal included the right to an effective appeal, whereby the state was required to pay the costs of reproducing the record and transcript on appeal of an indigent defendant.

In *Griffin v. California*, 380 U.S. 609 (1965), this Court held that the privilege against self-incrimination would be almost meaningless if its assertion was burdened with the penalty of free comment by the prosecution.

In the many decisions following *Brown v. Board of Education*, 347 U.S. 483 (1954), including the recent decision of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), this Court has sought to make meaningful the essence of equal protection of the laws so that it is not mere theory on paper, but rather reality in practice. In *Swann, supra*, this Court spoke in terms to which the spirit of this appeal is addressed, at 402 U.S. 1, 15-16:

> "However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution."

All of these decisions—Gideon, Argersinger, Powell, Escobedo, Miranda, Griffin v. Illinois, Douglas, Griffin v. California, Brown, Swann, supra, and Marbury, infra,—evidence a clear intent on the part of this court to effectuate and protect fundamental constitutional rights, just as petitioners argue in this case that a damage remedy

against the state officials is the only way to effectuate the assertion of their fundamental constitutional right.

It is striking that such considerable protection is afforded the rights of the lowliest accused, even a drunk driver, and yet your petitioners herein, Arthur Krause and Elaine Miller, must yet convince this Court to afford civil redress to protect not the accused, but the victims. Surely the innocent victims of this society, the Allison Krauses, the Jeffrey Millers, and their parents are entitled to the same consideration in the prosecution and protection of their civil rights as the defendant accused of committing a misdemeanor. This is plainly a matter of fundamental constitutional justice. See Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N. CAROLINA L. REV. 549 (1972); and Engdahl, *Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1 (1971).

Historically, in the area of military violence, the need for redress—even in the face of immunity—has been urged by this Court. *Beckwith v. Bean*, 98 U.S. 266 (1878); *Mitchell v. Harmony*, 54 U.S. (13 How.) 126 (1851); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1949); *Wise v. Withers*, 7 U.S. (3 Cr.) 330 (1806); *Little v. Barreme*, 6 U.S. (2 Cr.) 170 (1804); *Cf.* Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 COLORADO L. REV. 1 (1972).

More recent expressions of this Court buttress petitioners' contention that there is a constitutional right to a remedy. In *Parden v. Terminal R. of Alabama Dock Dept.*, 377 U.S. 184 (1964), a particularly noteworthy indication of this Court was expressed:

> "[W]e should not presume to say in the absence of express provision to the contrary, that it [F.E.L.A.]

> intended to exclude a particular group of such workers from the benefits conferred by the Act. To read a single 'sovereign immunity exception' into the Act would result, moreover, in a right without a remedy." (Emphasis added.) 377 U.S. 184, 190.

In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the importance of redress is manifest in the value judgment and decision of this Court. There, this Court cited the pertinent language in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), (at p. 163), as follows:

> "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for a violation of a vested legal right."

For all of these foregoing reasons, this Court should reject any argument that the Eleventh Amendment in any way bars the present actions brought by these petitioners.

III. DOES ANY DOCTRINE OF EXECUTIVE IMMUNITY BAR A DAMAGE ACTION AGAINST THE GOVERNOR OF OHIO AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD ACTING IN THEIR INDIVIDUAL CAPACITIES, INDIVIDUALLY AND IN CONSPIRACY, UNDER COLOR OF STATE LAW FOR THE INTENTIONAL DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER SECTION ONE OF THE CIVIL RIGHTS ACT OF 1871, 17 STAT. 13, 42 U.S.C. § 1983?

In addition to the claim that these petitioners are barred from bringing these actions by virtue of the Eleventh Amendment, respondents (along with the lower courts) also contend that they have the privilege of avoiding judicial review and redress by virtue of the doctrine of executive immunity. The question of executive im-

munity is raised, in the first instance, by Governor Rhodes.

Examining the claim of Governor Rhodes that he is entitled to assert the privilege of executive immunity, it becomes quickly apparent that the extension of executive immunity would place the Governor above the law. The essence of the argument is that the Governor should not be subject to judicial review in connection with orders given and measures taken as commander-in-chief of the military forces of the state. This executive immunity, as it is claimed by the respondents, would immunize the governor and others from suits, even in cases where the actions of the Governor are in bad faith and with the specific intent to violate a citizen's federal constitutional rights. The logic in support of executive immunity is set forth by Judge Weick in his opinion for the circuit court (Opinion of Judge Weick, Scheuer Appendix, page 12a):

> "To place a straight jacket on the state's Chief Executive in times of emergency so that he could not freely exercise his discretion, would indeed stop the state government 'in its tracks'."

Petitioners suggest that this Court should conclude that a greater danger to the state and its integrity is created by the removal of all judicial check on the conduct of the Governor and his generals in sending out military forces. If the Governor or others are beyond the pale of judicial review, particularly in such a serious matter as the sending, ordering, and controlling of military troops in civilian situations, then those officials are provided a judicial license to engage in whatever activities they choose whether wise or unwise, honest or malicious, constitutional or unconstitutional, with complete impunity. The life of a citizen, as in these cases, can be unconstitutionally taken, and there is no judicial redress whatsoever. A student, as in this case, can be paralyzed from the waist

down for the rest of his life by unconstitutional actions, and the courthouse doors are completely closed to him.

The present fact situation surrounding the incident of May 4, 1970 cannot be seen without reference to the political climate which existed at the time. Governor Rhodes was several days away from the date of the Republican Senatorial Primary in which he was one of the two leading contenders. The issues in that primary campaign involved persistent cries for "law and order", while at the same time the federal government was engaged in the extension of the IndoChina conflict into Cambodia, which then met with massive opposition and protest in student bodies throughout the country. Governor Rhodes had particularly advanced himself to the Republican electorate as the strong advocate of the so-called "law and order" position. It is not the intention of petitioners in this brief to discuss the merits or demerits of the Governor's "Law and Order" position, or the merits or demerits of the attitudes which prevailed amongst the student body. These are matters of political choice which any citizen is free to make. Petitioners urge upon this court that the atmosphere and climate of May 4, 1970, was rife with political passion. The Governor, on the night prior to the shooting, held a public press conference in which extreme and intemperate statements were made by him on the scene of Kent, Ohio in the presence and knowledge of the generals and troops. The Governor was personally present in command of these troops, working them up to a passioned frenzy in order, as petitioners contend, to achieve his personal political goals. Petitioners have alleged in substance, that the actions of this Governor, including the various orders he gave personally at the scene and elsewhere, individually and in conspiracy with others, directly resulted in the deaths of four innocent

students. Petitioners state unabashedly that the Governor was dishonest in his motives and unconstitutional in his actions. The Civil Rights Act was designed to reach this extreme kind of unconstitutional violation. Nothing could be more essential to the individual in the protection of his constitutional rights than his right to life—particularly where the use of military forces is involved. This court cannot resolve the issues regarding executive immunity, which are premised upon policy considerations, without reference to the factual context in which this tragedy occurred. CERTAINLY, PETITIONERS OUGHT TO HAVE AT LEAST A RIGHT TO PRESENT EVIDENCE TO A TRIAL COURT OF THE FACTUAL CONTEXT.

Moreover, as Judge Celebrezze specifically noted in his opinion (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, page 44a):

> "Another compelling reason for not applying a doctrine of executive immunity in suits under Section 1983 lies in the simple fact that such a doctrine, if added to the legislative and judicial immunity presently recognized under the statute, would totally circumscribe the remedy provided in Section 1983."

Reference must be made to the specific facts which are part of the record in this case. There were two Proclamations allegedly issued by the Governor, one on April 29, 1970, and the other on May 5, 1970 (the day after the Kent State shooting). (Appendix, pages 29-34.) The April 29th Proclamation makes no specific reference to Portage County where Kent State University is situated. It refers particularly to seven counties in Ohio, covering vast geographical areas of the state and populations in the millions. The Proclamation of April 29, 1970, refers to the existence of "unlawful assemblies and roving bodies of men acting with intent to commit felony and to do

violence to person or property in disregard of the laws of the State of Ohio and the United States of America." (Appendix, page 29.) These so-called "unlawful assemblies" and "roving bodies of men" refer to "wildcat strikes in the truck transportation industry", as indicated in the subsequent Proclamation of May 5, 1970. (Appendix, page 32.) It is true that by the Governor's Proclamation of May 5, 1970, mention is made of "disorders or threatened disorders on campuses of Ohio State University in Franklin County and campuses of other state assisted universities", referring to the earlier Proclamation. (Appendix, page 32.) There is no indication, however, that the earlier Proclamation of April 29, 1970, had anything to do specifically with any disorder at Kent State University.

Thus, the relevant Proclamation is the Proclamation of May 5, 1970, issued by the Governor **one day after the shootings had taken place.** The Proclamation of May 5, 1970 refers to what the Governor characterizes as prior **"verbal orders"** made to the Adjutant General of Ohio. (Appendix, page 32.) The Proclamation is obviously a self-serving attempt to justify the Governor's prior conduct, where the Governor states in the Proclamation itself that, "it is desirable to make a written record, both events and the derivation of authority exercised by personnel and units of the Ohio National Guard in Portage County and Franklin County." (Appendix, page 33.) The Governor makes few references to the nature or extent of the necessity for calling out troops on the Kent State campus on May 4, 1970. He refers to "disorders," "threatened disorders", maintaining "peace and order," "to protect life and property throughout the State of Ohio," "the restoration of order" and time of "public danger". (Appendix, pages 32-33.) **It is noteworthy that at no point in any of his proclamations does the Gov-**

ernor suggest that there was "riot" or "insurrection." A reading of the Proclamations does not indicate that the Governor had determined that there was a "riot" or "insurrection." Ohio Revised Code § 5923.21 reads as follows:

> "The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia." (Emphasis added.)

Ohio Revised Code § 5923.22 reads as follows:

> "When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities."
>
> "No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws of the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case." (Emphasis added.)

Nowhere in the entire set of Proclamations issued by the Governor is there any mention of the words "riot", "insurrection", "invasion", "tumult", or "mob". More importantly, the reference to campuses, which presumably includes Kent State University, refers only to "disorders", "threatened disorders", "peace and order", and "public danger". It would therefore appear that the Governor, by his own terms, was not reacting to a situation contemplated by Ohio Revised Code § 5923.21 or by Ohio Re-

vised Code § 5923.22. Certainly, the complaints set forth allegations quite to the contrary with regard to May 4, 1970. Moreover, in light of the decisions of *Moyer v. Peabody*, 212 U.S. 78 (1909) and *Sterling v. Constantin*, 287 U.S. 378 (1932), it is significant that the Proclamations of the Governor, even after the fact of the shooting, do not set forth conditions of riot or insurrection.

Moreover, and more importantly, these Proclamations only represent the claimed thinking of the Governor at the time they were issued. They certainly do not establish as fact the substance of their contents. Petitioners contest the truth of the contents of the Proclamation of May 5, 1970, and particularly, the Governor's claim concerning "verbal orders" at a prior time. Moreover, petitioners contend that the Proclamations do not include all of the orders given by the Governor. These are appropriate subjects for judicial inquiry and are clearly questions of fact for a court to resolve. As we stated in *Sterling v. Constantin, supra:*

> "What are the allowable limits of military discretion and whether or not they have been overstepped in a particular case are judicial questions . . . there is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity." 287 U.S. 378, 401.

In summary, then, it can be seen that the Governor himself, by his own terms, was never reacting to an "insurrection" or "riot", the existence of which was erroneously assumed by the lower courts. If there is any ambiguity or omission in the Governor's own Proclamations, surely that ambiguity must be resolved, on a motion to dismiss, in favor of the opposing party, namely the petitioners herein. Among other things, petitioners ought to be entitled to test the foundation, omissions and ambi-

guities in the Governor's Proclamations in discovery procedures.

It may be claimed by respondents that the Governor was responding to what amounted to riot or insurrection at times prior to May 4, 1970. The Concurring Opinion of Judge O'Sullivan places great weight on these claimed circumstances. It should be noted that the record of this case contains no such specific references with regard to the campus of Kent State University. It is true that the ROTC Building was burned down. It has not been clearly established by whom, nor what the specific causes of that were. The same can be said for the disturbances in the City of Kent, Ohio. The FBI noted that none of the students wounded or killed were found to be involved in any of the prior disturbances at Kent. (Justice Department Summary of FBI Investigation, Part I of this brief, at page 26, item number 23). Moreover, the Governor made personal appearances on the campus, taking over as commander in chief on the scene. He was conferring regularly with his generals and troops, and apparently giving orders at that time. All of this took place in the contest of a heated political campaign in which the Governor was an active candidate. Thus, the factual circumstances of this case go far beyond the broad generalities asserted in the Governor's Proclamations. He was not a dispassionate observer sitting behind his desk confronted with a riot, insurrection, or invasion. He was a highly charged political candidate running on a "law and order" platform, personally exerting his presence and authority as commander in chief over troops with loaded weapons on a college campus. **If the allegations in the complaints of petitioners are true, then the Governor of Ohio conspired and otherwise acted individually to violate the petitioners' constitutional rights, with the specific intent to**

do so. He is chargeable in this case with the knowledge he had and the orders he gave, including the fact that on May 4, 1970, there was absolutely nothing occurring on the campus of Kent State University which justified even the presence of massive units of troops with loaded weapons, let alone the incredible actions they allegedly took there. Petitioners are entitled to a judicial review of the Governor's conduct under these circumstances. This case was dismissed on the pleadings, with little or no real opportunity for discovery. Petitioners have a right to maintain the Governor as a defendant under these circumstances. There is a difference between judicial restraint and judicial abdication. To allow executive immunity to the Governor or the generals in these cases would amount to the latter.

With respect to the Governor, the two leading cases would appear to be *Sterling v. Constantin* and *Moyer v. Peabody, supra.* A review of these two decisions of this Court will quickly reveal the inapplicability of any notion of executive immunity in petitioners' cases.

Moyer, supra, involved a claim (by the alleged leader of an outbreak) that he had been unreasonably imprisoned for two and one half months by state troopers, directed to imprison him by the Governor of Colorado. The claim was made under the Civil Rights Act. The facts assumed by this Court in *Moyer* are critical to an understanding of its holding. As stated in the opinion of this Court:

> "The facts we are to assume are that a state of insurrection existed and that the governor, without sufficient reason, but in good faith, in the course of putting the insurrection down, held the plaintiff until he thought he could safely release him." (Emphasis added.) 212 U.S. 78, 84.

Clearly *Moyer* is distinguishable from the instant case. Whereas in *Moyer* the parties agreed that a state of insurrection existed, in the present case the parties do not so agree. In fact, not even the Governor of Ohio agrees that there was an insurrection, since he never used or implied such a thing even in his own after-the-fact Proclamation of May 5, 1970. Secondly, in *Moyer*, it was agreed by the parties that the Governor there had acted in good faith. The allegations of the complaints of petitioners in this action are hardly consistent with any such conclusion, and there is nothing in Governor Rhodes' Proclamation which suggests that he acted in good faith. That is surely a question of fact which is in issue in this case.

Thus, in *Moyer*, this Court reached a conclusion based upon the facts stipulated by the parties, which included the good faith of the Governor and the existence of a state of insurrection. Confronted with those stipulated facts, this Court, in *Moyer*, held as follows:

> "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief . . . it is not alleged that his judgment was not honest, if that be material, or that the Plaintiff was detained after fears of the insurrection were at an end." (Emphasis added.) 212 U.S. 78, 85.

More to the point is the subsequent decision of *Sterling v. Constantin, supra.* In that case suit was brought by the plaintiffs to enjoin the Governor of Texas and national guard generals from enforcing military and executive orders regulating and restricting the production of oil in plaintiffs' oil wells. The Governor of Texas had proclaimed a state of insurrection, tumult, riot and breach of

peace, had declared martial law, and had ordered generals to "enforce and uphold the majesty of the law." 287 U.S. 378, 387. The motive asserted was preventing plaintiffs from wasting oil. Plaintiffs alleged a conspiracy on the part of the Governor and the generals. Plaintiffs' claim was premised upon the alleged unconstitutionality of the orders which limited the oil production. It should be noted that the plaintiffs in *Sterling, supra,* were not thrown out of court at the pleading stage as in petitioners' cases herein. The district court did make findings of fact which concluded that there was no riot, tumult, insurrection, or state of war, but merely breaches of the peace.

The language of the court in *Sterling, supra,* is so clearly pertinent to the facts and legal issues of this case that petitioners set it forth as the best possible expression of their position on the subject of executive immunity:

> "And, when the federal court, finding his [the Governor's] action to have been unjustified by any existing exigency, has given the relief appropriate in the absence of other adequate remedy, appellants assert that the court was powerless thus to intervene, and that the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government.
>
> If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the state may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is

obviously untenable. **There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression.** To such a case the federal judicial power extends (article 3, § 2), and, so extending, the court has all the authority appropriate to its exercise. Accordingly, it has been decided in a great variety of circumstances that, when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the federal question, the court may, and should, analyze the facts." (Emphasis added.) 287 U.S. 378, 397-398.

While the Court, in *Sterling*, asserted that the decision of a governor regarding his discretion in determining the existence of an exigency requiring military aid is "conclusive", the allegations in petitioners' complaints clearly refer to more than the mere determination of an exigency requiring military aid. The complaints of petitioners with respect to the Governor of Ohio go well beyond such a determination. These complaints refer to a conspiracy, as well as individual actions, which were specifically intended to violate petitioners' constitutional rights. It is not a question of determining a military exigency. It is a question of orders given and measures taken with regard to meeting that claimed exigency. Those latter actions are clearly subject to judicial review as indicated in *Sterling, supra:*

"The nature of the power also necessarily implies that there is a permitted range of **honest judgment as to the measures to be taken** in meeting force with force, in suppressing violence and restoring order, for, without such liberty to make immediate decisions, the

power itself would be useless. Such measures, conceived **in good faith**, in the face of the emergency, and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the executive in the exercise of his authority to maintain peace." (Emphasis added.) 287 U.S. 378, 399-400.

* * * * *

"It does not follow from the fact that the executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. **What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.**" (Emphasis added.) 287 U.S. 378, 400.

It would seem, therefore, beyond reasonable dispute that petitioners' claims are well within the precedent of *Sterling, supra.*

Moreover, this Court has not hesitated to intervene to check the unlawful exertion of power by an executive, including even the President of the United States. Thus, this Court refused to endorse the suspension of civil rights and remedies by President Lincoln in *Ex parte Milligan*, 71 U.S. (4 Wall. 2) (1866). Similarly, this Court restrained President Truman from unlawfully seizing steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

The circuit court majority gave much weight to the legislative and judicial immunities which this Court has allowed in *Pierson v. Ray*, 386 U.S. 547 (1967) and *Tenney v. Brandhove*, 341 U.S. 367 (1971). Judge Weick

specifically noted in his opinion (Opinion of Judge Weick, Scheuer Appendix, page 12a):

> "And since the courts have granted to themselves absolute immunity, it would seem incongruous for them **not to extend the same privilege** to the executive." (Emphasis added.)

Thus, it would appear that the logic of the lower courts' reasoning leads to an "extension" of the immunity doctrine to the executive. This Court, for several reasons, should not affirm such an arbitrary "extension". As Judge Celebrezze noted, and petitioners believe quite correctly so (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, pages 44a-45a):

> "It is difficult to envision what, if any, remedy would remain under Section 1983 if, in addition to those persons who can bring themselves under legislative or judicial immunity, the broad class of persons who might be characterized as state executive officials is also immune from suit under the statute."

Moreover, such an "extension" of immunity to the executive would leave the citizen without any redress for violations of federal constitutional rights, and would seriously endanger the citizenry by creating a situation in which state executives and state officials could exercise unbridled license with impunity. After all, the Civil Rights Act is nothing less than a tort remedy created by Congress for violations of federal constitutional rights. One of the traditional functions of the tort law is to deter misconduct. When the law is removed, so is the deterrent. It is fair to assume that Congress intended that one of the effects of the Civil Rights Act would be to deter unconstitutional misconduct by state officials.

Finally, as noted by Judge Celebrezze, the executive immunity was not as firmly established from a historical

standpoint at the time of the passage of the Civil Rights Act, unlike the legislative and judicial immunities. (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, page 44a.)

An analysis of *Pierson* and *Tenney, supra,* support petitioners' aforementioned positions. In *Pierson,* a damage action was brought under the Civil Rights Act alleging a claim against city officials and a municipal police justice for false arrest and imprisonment. While this Court held that the officers were entitled to good faith and probable cause defenses but not to absolute immunity, this Court also held that the judge was immune for acts within his judicial role. Even in *Pierson,* there was a trial at which evidence was introduced, unlike in the instant cases. That evidence demonstrated that the plaintiffs were arrested for "sitting in" at segregated facilities in a southern bus terminal, specifically, in a "white only" waiting room. This Court noted specifically with respect to defendant Judge Spencer that:

> "The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before this court." [Footnote—there was no evidence of conspiracy on the part of Judge Spencer with other defendants demonstrated at the trial.] 386 U.S. 547, 553.

This Court then went on to refer to the "solidly established doctrine of judicial immunity." 386 U.S. 547, 553.

Moreover, in *Pierson,* this Court pointed out "that the legislative record gives no clear intent that Congress [in enacting the Civil Rights Act] meant to abolish wholesale all common law immunities." 386 U.S. 547, 554.

There are several observations petitioners would have this Court consider regarding the judicial immunity. First

of all, even that immunity has been withheld. For example, in *Ex parte Virginia*, 100 U.S. 339 (1897), this Court held that a magistrate could be criminally prosecuted under the criminal provisions of a civil rights statute making it a crime for "any officer or other person, charged with any duty in the selection or summoning of jurors" to disqualify grand or petit jurors "on account of race, color, or previous condition of servitude". In *Ex parte Virginia, supra*, this Court refused to extend to the magistrate judicial immunity from prosecution, holding that:

> "Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the ageent. . . . But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the state statute?" 100 U.S. 339, 348-9.

It should be noted that in *Pierson, supra*, proof and allegations were lacking as to Judge Spencer "playing any role in these arrests and convictions" other than making a finding of guilt. In *Pierson, supra*, this Court did not overrule *Ex parte Virginia, supra*, either expressly or by implication. *Ex parte Virginia* was specifically cited by Justice Douglas in his dissent in *Pierson, supra*.

In the present cases, the allegations of petitioners with respect to the Governor and generals go beyond the kind of limited role played by Judge Spencer in merely making a finding of guilt. The Governor, according to petitioners' allegations, played a rather active role, individually and in conspiracy, in killing innocent people. Thus petitioners' claims fall within the ambit of *Ex parte Virginia, supra*, which is still viable precedent.

Moreover, there is the additional consideration that a judicial determination, no matter how grievously it in-

fringes a citizen's constitutional rights, is always correctible by a judicial review of that decision. Indeed, there is the remedy of reversal where a judicial injustice occurs. This is unlike the present situation where the taking of life without due process of law is irrevocable. At least a judicial decision is subject to judicial review. But respondents would have it that an executive's decision is not subject to judicial review. Judge Weick suggests that "since the courts have granted to themselves absolute immunity it would seem incongruous for them not to extend the same privilege to the Executive." (Opinion of Judge Weick, Scheuer Appendix, page 12a.) Petitioners suggest, however, that since judicial decisions are subject to judicial review, it would seem incongruous not to extend the same judicial review to executive decisions.

Turning to the legislative immunity, the signal decision of this Court is *Tenney v. Brandhove, supra.* In *Tenney,* a California Senate Fact-Finding Committee on UnAmerican Activities and its individual members were sued by the plaintiff, Brandhove, who claimed that his federal constitutional rights were violated by those defendants on the basis that they maliciously called him as a witness for the purpose of intimidating him, and that they inspired local prosecuting attorneys to institute criminal proceedings against him, and that he was used as a tool of the Committee to smear a mayoral candidate. In addition, the defendants were allegedly being motivated by a desire to unconstitutionally punish Brandhove for circulating a petition in the California Legislature to convince that body not to continue to fund the Committee.

This Court held that that suit was barred on immunity grounds.

Again, this Court relied primarily upon historical premises in reaching the conclusion that Congress, in

enacting the Civil Rights Act, did not intend to abrogate the common law legislative immunity. This Court reasoned as follows:

> "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." 341 U.S. 367, 376.

Moreover, the Federal Constitution specifically implies a legislative immunity for the specific conduct involved in the *Tenney* allegations, *supra*. Article I, Section 6 of the Constitution reads as follows:

> "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; **and for any speech or debate in either house, they shall not be questioned in any other place.**" (Emphasis added.)

By way of general observation, it should be noted that what takes place in a legislative proceeding is inherently part of the fundamental concept of Freedom of Speech guaranteed in the First and Fourteenth Amendments. To infringe upon the prerogatives of a deliberative body involves an encroachment upon the essential freedom of expression and thought which is indispensable to the legislative process. Moreover, actions of a state legislature, particularly those involved in the basic legislative process such as debate and investigation, are less likely to cause harm without any prospect of redress, unlike executive action. That is to say, a legislative action by its nature is generally cumbersome, and an aggrieved

individual, like Brandhove, has at least the remedy of attempting to vindicate his name by petitioning the legislature not to fund the committee and by voicing his objections in the public forum. Indeed, Brandhove did these things. In short, the best cure for bad speech is more speech. Thus, even a maliciously oriented and perversely motivated legislative committee is in no position to commit the kind of grievous harm that can be committed by a governor exercising authority over troops carrying weapons of death. There is no answer at the receiving end of an M-1 bullet.

In summary, there is absolutely no justification for this Court to extend the legislative and judicial immunities under the Civil Rights Act to include the executive branch of the government. Indeed, there is sound basis for not so extending the immunity.

The history of the Civil Rights Act bespeaks its fundamental role in deterring unconstitutional executive action and providing for redress in such instances. Cf. *Mitchum v. Foster, Monroe v. Pape, Zwickler v. Koota,* and *Perez v. Ledesma,* (Opinion of Justice Brennan, concurring in part and dissenting in part), *supra.*

The circuit court relied additionally on the decisions in *Gregoire v. Biddle,* 177 F.2d 579 (2nd Cir. 1949) and *Barr v. Matteo,* 360 U.S. 564 (1959). Those decisions are inapplicable to the instant cases. In *Gregoire, supra,* the plaintiff, a non-citizen, contended that he was falsely arrested by federal officers as an enemy alien, alleging malice and ill-will in connection with the alleged false arrest. The court held that the federal officers were absolutely immune from suit, notwithstanding the allegations of malice. Thus, the court held that the plaintiff failed to state a cause of action in his complaint. Although the suit, in part, was brought ostensibly under 42 U.S.C. § 1983, the

court similarly rejected the applicability of Section 1983 for the obvious reason that the suit was against federal officers, and thus not against any person acting under color of state law. Obviously, the Civil Rights Act applies by its terms to actions against state officials, as opposed to federal officials. Thus, the court in Gregoire, supra, was not faced with a complaint which was brought under the authority of the Civil Rights Act. This becomes apparent in reviewing the language of the court:

> "Section 43 is so plainly limited to acts done under color of some state or territorial law or ordinance that no discussion can make it clearer than appears from its reading." 177 F.2d 579, 581.
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> * * * * *
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> "The decision on which the plaintiff relies [*Picking v. Pennsylvania R.R. Co.*, 151 F.2d 240 (3rd Cir. 1954)] indeed holds that the doctrine of absolute immunity for official acts does not cover claims arising under Section 43 of the Civil Rights Act; but it is not in point because as we have just said, the case at bar is not within that section." (Emphasis added.) 177 F.2d 579, 582.

The fact that *Gregoire, supra,* was not brought under Civil Rights Act cannot be overlooked. Although it is true that Judge Hand advanced elaborate reasoning in support of his concept of absolute immunity in the dicta of his decision, that reasoning is not only dangerously defective, but also without application to an Act of Congress. As has been noted by this Court on numerous occasions, the Civil Rights Act was passed by Congress to interpose the judiciary between the power of the state and the rights of the individual. The Civil Rights Act dealt with the fundamental relationship, not between the federal government and the citizen, but between the state and the citizen. A suit against federal officials does not

fall within the logic, purpose and intent of the Civil Rights Act. Moreover, the fundamental premise upon which Judge Hand based his argument in favor of absolute executive immunity is contrary to the recognized function and intent of the Civil Rights Act as a tort remedy. All of Judge Hand's arguments for executive immunity have already been considered and resolved to the contrary by the Congress of the United States in 1871, as evidenced by the enactment of 42 U.S.C. § 1983. Whatever "merit" there is to executive immunity in the view of Judge Hand, that "merit" has apparently been outweighed by other more important considerations in the minds of the legislators who enacted the Civil Rights Act of 1871. Cf. *Mitchum v. Foster, Monroe v. Pape, Zwickler v. Koota,* and *Perez v. Ledesma* (Opinion of Justice Brennan concurring in part and dissenting in part), *supra.*

Moreover, the reasoning of Judge Hand in *Gregoire, supra,* has been criticized. One such expression of criticism is found in the concurring opinion of Judge Merrill of the Ninth Circuit in the case of *S & S Logging Co. v. Barker,* 366 F.2d 617 (9th Cir. 1966). Judge Merrill therein wrote as follows:

> "I cannot agree with the majority that the *Gregoire* rule is a 'salutary' one. It operates to deprive a plaintiff of redress for torts actually and maliciously committed. This unjust result is, in *Gregoire,* apologetically swallowed as the lesser of two evils for the reason that otherwise the zeal of federal officers in carrying out their official duties would be impaired. Cf. *Prosser on Torts,* pp. 803, 1014-18 (3rd ed. 1964), and comments there cited." 366 F.2d 617, 626.

Other courts have made similar expressions in actions under Section 1983. For example, in *Beauregarde v. Wingard,* 230 F. Supp. 167 (S.D. Cal. 1964), the district court overruled a motion to dismiss an action brought

under 42 U.S.C. § 1983, where it was alleged that police officers, who arrested plaintiff, acted without cause, maliciously and intentionally, in violating plaintiff's rights under the Fourteenth Amendment. That court, in full awareness of the dicta of Judge Hand in *Gregoire, supra,* having quoted same at length (230 F. Supp. 167, 172-3), held as follows:

> "A suit under Section 1983 of Title 42 U.S.C.A. of course involves the prohibition of a federal statute, and it is a familiar doctrine that such a statute may not be set at naught or is benefits denied by state statutes, state common law rules, or state decisional law." 230 F. Supp. 167, 173.

Still another example of judicial criticism of *Gregoire, supra,* is found in the decision of *Kelley v. Dunne,* 230 F. Supp. 969 (1964), reversed and vacated in 344 F.2d 129 (1st Cir. 1965). *Kelley, supra,* involved a complaint against a postal inspector for defamation and for unlawful search and seizure of plaintiff's property. In the district court the defendant moved to dismiss on the ground that at all times "he was acting pursuant to regulations and directions of the Post Office Department of the United States." 230 F. Supp. 969, 970. The lower court upheld the defendant's contention of immunity and dismissed plaintiff's action primarily on the authority of Judge Hand in *Gregoire, supra.* **The first circuit court thereafter reversed the lower court's dismissal, rejecting the applicability of Gregoire, supra, after a detailed discussion of that decision. The First Circuit Court of Appeals reasoned that "where an officer knows that he is acting out of the ordinary, he is on notice of the circumstances, and there is more reason for him to have to justify his conduct."** (Emphasis added.) 344 F.2d 129, 132. In the instant cases, Governor Rhodes certainly knew he was "acting out of

the ordinary . . . and there is more reason for him to have to justify his conduct."

Finally, the lower courts also relied upon the decision of this Court in *Barr v. Matteo, supra.* In *Barr,* the plaintiff sought damages for libel against a federal employee who made statements in connection with a press conference. *Barr, supra,* is easily distinguishable for several reasons: first, there was no allegation in the complaint of any unconstitutional act on the part of the defendant. Secondly, there was no allegation that the federal employee was acting under color of any state law. Indeed, the action was not brought under 42 U.S.C. § 1983 as is petitioners' action. Thus, all of the justifications for immunity involving a federal official would not apply where this Court is reviewing allegations brought under an Act of Congress specifically designed to reach the actions of state officials who violate the constitutional rights of citizens. For the same reason that *Gregoire, supra,* is inapplicable, so too is *Barr, supra,* inapplicable to the instant cases. Whatever logic was advanced in *Barr* in support of an executive immunity, that logic does not apply where Congress has specifically expressed an intention to create a cause of action against a specific state official.

In summary, then, this Court should reject the application of a new executive immunity to actions brought under the Civil Rights Act. Here we have a Governor, commanding generals and guardsmen who have allegedly committed unconstitutional actions resulting in the deaths and maimings of innocent students on a college campus. These individuals should not be immune from the operation of the law, nor should they be above the law. Congress has passed an enactment pursuant to the Fourteenth Amendment which, if it means anything, surely means that liability attaches to executive abuse. These are obvi-

ously such cases, alarming in their allegations of the excessive use of official force. The Kent incident, so extraordinary an occurrence, will undoubtedly become a permanent and tragic part of American History. A finding by this Court that under the extreme and exceptional circumstances of the Kent State shootings the aggrieved parties have a right of redress in the courts will hardly hamstring future governors and military officials in the legitimate exercise of their authority; a decision in favor of petitioners that they may seek redress in court will surely serve as an appropriate judicial check on the excessive and unconstitutional abuse of power by state officials, from the governor to the guardsmen to the University President. It may help to avoid another Kent State tragedy by giving effect and meaning to the deterrent that Congress intended in enacting the Civil Rights Act in 1871.

IV. WHERE CITIZENS OF PENNSYLVANIA AND NEW YORK BRING DAMAGE ACTIONS IN FEDERAL COURT AGAINST THE GOVERNOR OF OHIO AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD, THESE DEFENDANTS ALL BEING CITIZENS OF OHIO, FOR COMMITTING INDIVIDUALLY AND IN CONSPIRACY THE WANTON KILLING OF INNOCENT STUDENTS ON A COLLEGE CAMPUS, AND WHERE AN OHIO STATUTE (OHIO REVISED CODE §5923.37) SPECIFICALLY PROVIDES FOR LIABILITY UNDER SUCH CIRCUMSTANCES, DOES A FEDERAL COURT HAVE JURISDICTION BASED UPON THE DIVERSITY OF CITIZENSHIP OF THE PARTIES?

Judge Celebrezze in his dissent writes as follows (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, pages 68-69):

> "Without having heard evidence respecting the allegations of intentional, willful, and wanton misconduct, the District Court could not properly dismiss the

wrongful death actions as against these defendants-appellees.

I therefore believe that the District Court erred in dismissing the wrongful death actions set forth in the Krause and Miller complaints, which were before the court under its original, diversity jurisdiction. These actions are not barred by the Eleventh Amendment."

Judge Celebrezze's reasoning is the only reasoning with respect to the diversity basis of jurisdiction, since neither Judge Weick nor Judge O'Sullivan dealt with the issue at all.

Congress established federal diversity jurisdiction in 28 U.S.C. §1332. Petitioners' complaints allege a cause of action under state law, namely, Ohio Revised Code §5923.37, which reads as follows:

"When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area **unless the act is one of willful or wanton misconduct.**" (Emphasis added.)

The allegations of the pleadings bring this action within Ohio Revised Code §5923.37. This statute supersedes and waives any immunity otherwise available to the State of Ohio. It creates a cause of action such as the one alleged in the pleadings in this case. The basis of jurisdiction in this instance is not premised upon the existence of a federal question, but rather is premised upon the existence of a state statute providing for redress in a given situation. Where there exists diversity of citizenship of the parties, an action may be brought in federal court upon a state claim. Such an action, as in this case, is not barred by the Eleventh Amendment, where the state law clearly provides for liability of individuals, namely "members"

of the organized militia. This serves to emphasize how strained it is for the lower court to assert that these actions are being brought against the sovereign, and not against individuals. The state law itself provides for these actions in its own courts against individuals. The federal court has an obligation to recognize state law in this regard. Moreover, there is no state sovereign immunity which would immunize members of the organized militia from liability. This is not a suit against the State of Ohio as an entity, claiming damages recoverable from the state treasury, as in *Krause, Admr. v. State of Ohio,* 31 Ohio St. 2d 132, 285 N.E. 2d 736 (1972). Moreover, to the extent that Ohio seeks to claim sovereign immunity (assuming *arguendo* that the present action were against the State of Ohio), the application of the doctrine of state sovereign immunity is unconstitutional in that it violates the rights of these petitioners to due process of law and equal protection of the laws guaranteed in the Fourteenth Amendment. Cf. the dissenting opinion of Justice Lloyd Brown of the Ohio Supreme Court in *Krause, Admr. v. State of Ohio, supra.*

The term "wanton misconduct" as used in Ohio Revised Code §5923.37 comprehends the kind of conduct alleged in the complaints. Thus, in *Universal Concrete Pipe Co. v. Bassett,* 130 Ohio St. 567 (1936), the Supreme Court of Ohio defined wanton misconduct as follows (at page 568):

> ". . . such misconduct as manifests a disposition to perversity and . . . under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious under such surrounding circumstances and existing conditions that his conduct will in all common probability result in injury." (Emphasis added.)

Similarly, in *Kellerman v. J. S. Durig Co.*, 176 Ohio St. 320 (1964), the Ohio Supreme Court defined wanton misconduct as follows (at page 320):

> "Wanton misconduct charged against a defendant implies a disposition to perversity and a failure to exercise any care toward those to whom a duty of care was owing when the probability that harm would result from such failure was great and such probability was actually known, **or in the circumstance ought to have been known** to the defendant." (Emphasis added.)

See also the cases of *Gossett v. Jackson*, 100 Ohio App. 2d 121, 226 N.E. 2d 142 (1965); *Reserve Trucking Co. v. Fairchild*, 128 Ohio St. 519, 191 N.E. 745 (1934); *White v. Harvey*, 170 Ohio St. 262, 163 N.E. 2d 898 (1960); *Botto v. Fischesser*, 174 Ohio St. 322, 189 N.E.2d 127 (1963); *Roszman v. Sammet*, 20 Ohio App. 2d 255, 254 N.E.2d 51 (1969).

For these reasons, the Circuit Court erroneously disregarded the diversity claims, and this Court should reverse the Circuit Court with respect to those claims.

V. IS THE UNITED STATES A NECESSARY PARTY IN A DAMAGE ACTION BROUGHT AGAINST THE GOVERNOR OF OHIO AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD IN THEIR INDIVIDUAL CAPACITIES ALLEGING THAT THESE DEFENDANTS, ACTING INDIVIDUALLY AND IN CONSPIRACY UNDER COLOR OF STATE LAW, COMMITTED INTENTIONAL DEPRIVATIONS OF CONSTITUTIONAL RIGHTS UNDER SECTION ONE OF THE CIVIL RIGHTS ACT OF 1871, 17 STAT. 13, 42 U.S.C. §1983?

Judge Weick, writing for the majority below, asserted as follows (Opinion of Judge Weick, Scheuer Appendix, page 19a):

> "It would appear that the United States was a necessary party to the determination of the issues as it was involved in the training of the National Guard and their use of weaponry. Failure to join an indispensible party requires dismissal of the action. Rules 12(b) and 19, Fed. R. Civ. P. Any decision rendered by the District Court relative to the training and weaponry of the guard would require action to be taken by both state and federal governments. To require such action to be taken is beyond the jurisdiction of the court. The United States has not consented to be sued." (Emphasis added.)

This holding of Judge Weick is erroneous. The United States is not a necessary party based upon the plain allegations of the complaint. Simply because the United States was "involved" in the training of the National Guard and their use of weaponry does not necessitate that the United States be named as a defendant. We are here dealing with the alleged misconduct of state officials acting under color of state law. There is absolutely no allegation relating to involvement of federal officials. Moreover, as contended in the preceding section, with respect to the State of Ohio, any bar to this action premised upon the failure of the United States to consent to suit violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Inasmuch as the Circuit Court, in part, premised its holding on the necessity of the United States as a party defendant, a conclusion altogether unjustified by the allegations, this Court should reverse the Circuit Court.

CONCLUSION

For the foregoing reasons this Court should reverse the decision of the United States Sixth Circuit Court of Appeals, and remand this case so as to permit petitioners to proceed with discovery and proof in connection with their claims.

Respectfully submitted,

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